

ORIGINAL

96/10/01
pm

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, : SUPERIOR COURT NO.
APPELLEE 1451 PGH 1998

VS.

1:01 CV 327

MARK BAILEY, APPELLANT

REPRODUCED RECORD OF THE APPELLANT,

MARK BAILEY

(On appeal from the Order dated July 7, 1998 of the Honorable John B. Leete of the Court of Common Pleas of Potter County, Criminal Division, which denied the Post Sentence Motions of Mark Bailey and affirmed the judgment of sentence dated February 4, 1998. The matter was docketed in the Court of Common Pleas, Potter County, Criminal Division, at docket number 93 of 1997).

Samuel C. Stretton, Esquire
Attorney for Appellant
301 S. High St.
P.O. Box 3231
West Chester, PA 19381
(610) 696-4243
Attorney I.D. No. 18491

FILED
HARRISBURG, PA

MAY 3 1 2001

MARY E. D'AMICO, CLERK
Per [Signature] Deputy Clerk

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FILE COPY

COMMONWEALTH OF
PENNSYLVANIA

Vs.

MARK BAILEY

:IN THE COURT OF COMMON PLEAS OF
POTTER COUNTY, PENNSYLVANIA

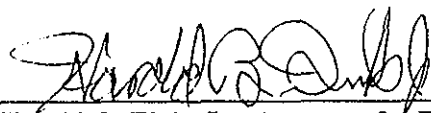
:No. 93 of 1997

:CRIMINAL DIVISION

:OTN No. E640223-3

NOTICE OF APPEAL

Notice is hereby given that MARK BAILEY, defendant above-named, hereby appeals to the Superior Court of Pennsylvania from the Order entered in this matter on the 7th day of July, 1998. This Order has been entered in the docket as evidenced by the attached copy of the docket entry.



Harold B. Fink, Jr., Attorney for Defendant
Harold B. Fink, Jr., P.C.
P. O. Box 403, 32 Main Street
Port Allegany, PA 16743
(814) 642-2595
Supreme Court I.D. No. 10232

Dated: 8/5/98

A - 1

A - 7

ORDERS (continued)

4-29-97 Entry of appearance of Harold B. Fink and Important Notice filed.
 5-7-97 Omnibus Pre-Trial Motion filed.
 6-18-97 Subp. issued to Trooper Kenneth Davis on behalf of the Commonwealth
 6-23-97 Amended Omnibus Pre-Trial Motion filed.
 6-24-97 Order filed. AND NOW, this 17th day of June 1997, the defendant appearing before the Court for hearing on an omnibus pretrial motion and the defendant having made a motion through counsel to continue the hearing so that he can further amend his motion, the defendant's request for a continuance is granted and final hearing on this matter will be held on July 11, 1997 at 9:45 a.m. BY THE COURT: John B. Leete, P.J. *7-5-97 Motion on Cont Mot to Delay was granted and amended*
 7-16-97 Request for Rule For Bill of Particulars filed.
 7-25-97 Response to Bill of Particulars filed.
 12-24-97 Order filed. AND NOW, this 25th day of December 1997, Defendant's Petition for Reduction of Bail is hereby denied without hearing. BY THE COURT: John B. Leete, p.J.
 12-17-97 Verdict filed. See COSTS Instrument.

Judgement Fee	\$9.50
Court Costs (DJ)	41.00
Subpoenas (Comwith)	22.50
Witnesses	12.00
Clerk	100.00
Report	\$10.00
CVC (Act 139)	15.00
Crimes Commission	15.00
Domestic Violence (Act 157)	10.00
EMS (Act 45)	
Act 158	\$5.00
Cat Surcharge	
Appeal From DJ	
Appeals to App. Court	
Postage (Dist. Justice)	
Postage (Clerk of Courts)	
Subpoenas (Defendant)	
JCP — Dist. Justice	15.00
JCP — CLERK	
FINES:	
County	
State	
Local	
TOTAL FINES:	
A.R.D.-E.M.S.	
A.R.D.	
Satisfaction Fee	\$5.00
TOTAL DUE	

DATE	PAYMENTS AMOUNT	BALANCE
------	--------------------	---------

TO STATE:
(Act 204 #8-7-51)

TRIAL AND PLEA PROCEEDINGS

JUDGE: John B. Leete COURT STENOGRAPHER: Ann Marie Jusko
DIS. ATTY: Jeff Leber DEFENSE ATTORNEY: Harold B. Fink

PLEAS

DATE: _____ GUILTY PLEA: _____ NOLLE POSSE: _____
CHARGE REDUCED TO: _____ ARD: _____

TRIAL

DATE: 12-17-97 TYPE: Jury VERDICT: GUILTY Cts. 1-12

SENTENCE

2-4-98 - As to Ct. 1 AGGRAVATED ASSAULT, Bureau of Corrections for not less than 5 nor more than 10 yrs. As to Ct. 2 AGGRAVATED ASSAULT, Bureau of Corrections for not less than 5 nor more than 10 years. Sentences between ct 1 & 2 Consecutive. As to Cts. 3 & 4 AGGRAVATED ASSAULT each ct. not less than 5 nor more than 10 yrs. Bur. of Corrc. Concurrent. As to Four Cts. involving SIMPLE ASSAULT. No sentence merged into Agg. Asslt. As to Four Cts. of ENDANGERING WELFARE OF CHILDREN imprisonment not less than 6 nor more than 24 mos. on each such ct. concurrent between all counts and concurrent with Ct. 1 & 2. Costs Credit for all time served to date.

DATE APPEAL FILED: 8-6-98 RECORD SENT: _____
APPELLATE NUMBER: _____ COURT: Superior

1. Docket Number of Final Issuing Authority CR-0000039-97		2. Common Pleas Docket Number No. 55 of 1997		3. State Registration Number OTN E 640223-3	
4. Final Issuing Authority to be Completed by Final Issuing Authority MICHELLE M. TASILLO		DISTRICT NO. 55 3 01		5. Transferred from Initial Issuing Authority DISTRICT NO.	
6. Name and Address (Last Name First) BAILEY, MARK 7 MAIN ST PO BOX 81 ROULETTE, PA 16746		7. Date of Transfer		8. Docket No. of Initial Issuing Authority CR-0000039-97	
9. Affiant Who Signed Complaint (Name and Address) WILLIAM L. DAWSON PA ST POLICE RD 1, BOX 259A COUDERSPORT, PA 16915					
10. Date of Birth MM DD YY 06 24 70		11. Sex M		12. Race PA	
13. Operator License Number 23437636		14. State PA		15. ORI PAPSP1500	
16. OCA F2-547516		17. Badge Number/Officer I.D. 3838			
18. Date of Arrest MM DD YY 03 19 97		19. Date Complaint Filed or Citation Issued MM DD YY 03 19 97		20. Summons MM DD YY 03 19 97	
21. Warrant MM DD YY 03 19 97		22. Summons Returned MM DD YY 03 19 97		23. Preliminary Arraignment MM DD YY 03 19 97 10:30 A	
24. Time 10:30 A		25. Date Waived to Court MM DD YY		26. Date Set for Preliminary Hearing MM DD YY	
27. Address of Preliminary Hearing/Summary Trial 110 NORTH EAST STREET, COUDERSPORT, PA 16915		32. Date Set for Preliminary Hearing MM DD YY			
28. Description of Charges		29. Offense Date MM DD YY		30. Section and Subsection	
1. 1G SIMPLE ASSAULT		M1 02 03 96		CC2701A1 HDCT	
2. H SIMPLE ASSAULT		M1 02 03 96		CC2701A1 HDCT	
3. I ENDANGERING WELFARE OF CHILDREN		F3 02 03 96		CC4304 HDCT	
4. J ENDANGERING WELFARE OF CHILDREN		F3 02 03 96		CC4304 HDCT	
5. K ENDANGERING WELFARE OF CHILDREN		F3 02 03 96		CC4304 HDCT	
6. L ENDANGERING WELFARE OF CHILDREN		F3 02 03 96		CC4304 HDCT	
34. Advised of His Right to Apply for Assignment of Counsel? X Yes <input type="checkbox"/> No		35. Public Defender Requested by the Defendant? <input type="checkbox"/> Yes X No		36. Application Provided for Appointment of Public Defender? X Yes <input type="checkbox"/> No	
37. In cases where so required, I the within named Issuing Authority, did make a reasonable effort to settle the difference between the Defendant and the Complainant on:		38. Codefendant(s) Name		39. OTN	
40. Enter 'C' for witness for Complainant. Enter 'D' for witness for Defendant		41. Witnesses Names and Addresses and Names and Addresses of persons (not more than 2). Defendant wishes to be Notified for trial		42. Sworn	
43. Testified		44. Other Persons to be Notified		45. I.D. No.	
46. Complainant LEBER, JEFFREY		47. Defendant FINK ESQ., H B BOX 403 PORT ALLEGANY, PA 16743		48. I.D. No. 10232	
49. Date of Decision MM DD YY		50. Fines Amount .00		51. Costs .00	
52. Judgment of Sentence BAL: \$.00		Name and Address of Corporate Surety and Agent or Individual Surety-Preliminary Arraignment			
53. Type S		54. Amount \$		55. Date Set MM DD YY	
56. Date Bail Posted MM DD YY		Name and Address of Corporate Surety and Agent or Individual Surety-Preliminary Hearing			
57. Type S		58. Amount \$		59. Date Set MM DD YY	
60. Date Bail Posted MM DD YY		61. If Committed Date 03 19 97			
62. Code C		63. Place of Commitment POTTER COUNTY JAIL		64. Date of Commitment COUDERSPORT PA	

COPY: CLERK OF COURTS



64. Date Transcript Sent to Court
MM DD YY
04 25 97

Certified this 25th day of APRIL, 1997

My commission expires first Monday of January, 2000.

SEAL

Michelle M. Tasillo
I, the above named Issuing Authority certify that this Transcript is a true and correct Transcript of the Docket.

AOPC 501A-94

PRINTED: 4/25/97 14:17:49

PRE-TRIAL PROCEEDINGS

DATE OF: INFORMATION _____ ARRAIGNMENT _____ WAIVER _____

DEFENSE COUNSEL _____

BAIL DATA

AMOUNT SET: _____ COMMITMENT DATE: _____ DATE RELEASED: _____

TYPE FURNISHED: _____ SURETY: _____

DATE BAIL RECEIVED: _____ DATE BAIL RETURNED: _____

A-4

Date Filed

ORDERS (continued)

8-20-97 Finding of Fact, Discussion and Order on Defendant's Omnibus Pretrial Motion filed. AND NOW, this 14 day of August 1997, in accordance with the foregoing opinion Defendant's Omnibus Pretrial Motion to Suppress is hereby denied. BY THE COURT: John B. Leete, P.J.

11-10-97 AND NOW, this cause coming on for trial the following Jurors were selected: Jeanne Chappell, Karen Foust, Judy Crippen, Thomas Coyle, Walter Fleet, Paula Cochran, Norma Cornell, Sally Crain, Joseph Scott, Charles Cooper, Shawn Clark, Honey Dunn. Alternates: Barbara Moag, Joseph Bunnell

11-17-97 Subp. issued to Chad Setzer, Dr. Robert Supinski, Dr. Marian Asar, Dr. Louise Dallaire, Sgt. Joseph Shirley, Tpr. Kenneth Davis, Laurie Moore, Tammy Baker on behalf of the commonwealth

11-26-97 Subp. issued to Amy Tuttle on behalf of the Commonwealth.

12-9-97 Subp. issued to Medical Records Custodian

12-15-97 Subp. issued to Jenny Murphy and Meryl Storey, R.N. on behalf of the Commonwealth

12-15-97 Amended Bill of Particulars filed.

12-15-97 Subp. issued to Dee Carr, COSTS RN and Michael Wayne Moore on behalf of the Commonwealth.

12-16-97 - Motion for Continuance filed.

12-24-97 - Petition for Reduction of Bail filed.

COSTS

12-16-97 - Motion for Continuance filed.
12-24-97 - Petition for Reduction of Bail filed.
Judgement Fee: \$9.50

12-24-97 - Petition for Reduct \$9.50
Judgement Fee.....

Court Costs (DJ)

Subpoenas (Comwlth)

Witnesses.....

Clerk

Report \$10.00

CVC (Act 139)

Crimes Commission.....

Domestic Violence (Act 157).....

EMS (Act 45).....

Act 158	\$5.00
---------	--------

Cat Surcharge.....

Appeal From DJ

Appeals to App. Court.....

Postage (Dist. Justice)

Postage (Clerk of Courts)

Subpoenas (Defendant)

JCP = Dist. Justice.....

JCP = CLERK.....

FINES:

County _____

County.....
State.....

State
Local

TOTAL FINES: _____

TOTAL FINES.....

A.R.D.-E.M.S.

A.R.D.

Satisfaction Fee \$5.00

TOTAL DUE

[illegible]

TRIAL AND PLEA PROCEEDINGS

JUDGE: _____ COURT STENOGRAPHER: _____

DIS. ATTY: _____ DEFENSE ATTORNEY: _____

PLEAS

DATE: _____ GUILTY PLEA: _____ NOLLE POSSE: _____

CHARGE REDUCED TO: _____ ARD: _____

TRIAL

DATE: _____ TYPE: _____ VERDICT: _____

SENTENCE

DATE APPEAL FILED: _____ RECORD SENT: _____

APPELLATE NUMBER: _____ COURT: _____

No. 93 of 1997

Continued

BAILEY, Mark

12-29-97 - Points for Charge filed.

12-29-97 - Order filed. Probation to prepare a full presentence report, to include a basic psychological interview to be performed by the Charles Cole Memorial Hospital, Dept. of Community Mental Health. As to bail, the Commonwealth's motion for modification of bail is granted and the defts. bail will be increased to the sum of \$25,000 cash. In the event the deft. cannot post bail he is remanded to the custody of the Sheriff. Deft. to appear for sentencing on Feb. 4, 1998 at 3:15 p.m.

2-4-98 - Order filed. See Sentence.
2-5-98 - Guideline Sentence Form filed.
2-9-98 - Post-Sentence Motion filed.

4-21-98 - Order filed. AND NOW, this 15th day of April 1998, Counsel will have 20 days after the completion of the trial transcript and charge of the Court to submit briefs as to the outstanding matters raised by the defendant's post trial motion and argument held thereon. BY THE COURT: John B. Leete, P.J.

6-2-98 - Partial Transcript of the Jury Trial held on December 12, 1997 filed.

7-2-98 - Order filed. AND NOW, this 12th day of June 1998, the Court having partially completed an Opinion relative to Defendant's outstanding post trial motions, the Court having spoken informally with Defense Counsel who agreed that the Court could utilize the extra 30 days for a decision as provided for by law, the Court hereby invokes the extra 30-day period as provided by Rule 1410 B 3 (b) to decide the defendant's outstanding post trial motions. An appropriate Order and Opinion will be filed. BY THE COURT: John B. Leete, P.J.

7-8-98 - Opinion and Order on Post Trial Motion on Behalf of Defendant Mark Bailey filed. AND NOW, this 7 day of July 1998, the Post Trial Motion for a New Trial, a Judgment of Acquittal or a Sentence Modification in the above captioned matter is hereby denied. BY THE COURT: John B. Leete, P.J.

8-6-98 - Notice of Appeal (Order entered July 7, 1998), Request for Transcript, and Certificate of Service filed.

8-6-98 - Certified copy of Notice of Appeal, Request for Transcript and Certificate of Service mailed to Superior Court.

8-24-98 - Transfer Petition filed. From CDCC to SCI-Albion

8-31-98 - Transcript of the Remaining of the Jury Trial held on December 16-17, 1997 filed.

9-8-98 - Order filed. AND NOW, this 4th day of September 1998, in accordance with Pennsylvania Rule of Appellate Procedure 1925 A, the Court designates its Opinion and Order dated July 7, 1998, filed of Record as the reason for the denial of Defendant's Post Sentencing Motion. Reference is also made to the transcript filed of Record on June 2, 1998 and August 31, 1998. BY THE COURT: John B. Leete, P.J.

9-10-98 - Fax Copy of Superior Court No. 01451PGH98 received and filed.

9-10-98 - All papers mailed to Superior Court

A-6

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
 : OF POTTER COUNTY, PENNSYLVANIA
 :
 vs. : CRIMINAL DIVISION
 :
 MARK BAILEY : NO. 93 OF 1997

THE DISTRICT ATTORNEY of Potter County, Pennsylvania, by this information, charges that on (or about) FEBRUARY 3, 1996 TO SEPTEMBER 23, 1996, at the BOROUGH OF COUDERSPORT and TOWNSHIP OF ROULETTE in the said County of Potter, and within the jurisdiction of this Court, MARK BAILEY did commit the following act(s):

(1) AGGRAVATED ASSAULT - Said actor attempted to cause serious bodily injury to another or caused such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. BEING CONTRARY TO 18 Pa.C.S.A. §2702(a)(1). (F1)

(2) AGGRAVATED ASSAULT - Said actor attempted to cause serious bodily injury to another or caused such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. BEING CONTRARY TO 18 Pa.C.S.A. §2702(a)(1). (F1)

(3) AGGRAVATED ASSAULT - Said actor attempted to cause serious bodily injury to another or caused such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. BEING CONTRARY TO 18 Pa.C.S.A. §2702(a)(1). (F1)

(4) AGGRAVATED ASSAULT - Said actor attempted to cause serious bodily injury to another or caused such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. BEING CONTRARY TO 18 Pa.C.S.A. §2702(a)(1). (F1)

(5) SIMPLE ASSAULT - Said actor attempted to cause or intentionally, knowingly or recklessly caused bodily injury to another. BEING CONTRARY TO 18 Pa.C.S.A. §2701(a)(1). (M1)

(6) SIMPLE ASSAULT - Said actor attempted to cause or intentionally, knowingly or recklessly caused bodily injury to another. BEING CONTRARY TO 18 Pa.C.S.A. §2701(a)(1). (M1)

(7) SIMPLE ASSAULT - Said actor attempted to cause or intentionally, knowingly or recklessly caused bodily injury to another. BEING CONTRARY TO 18 Pa.C.S.A. §2701(a)(1). (M1)

(8) SIMPLE ASSAULT - Said actor attempted to cause or intentionally, knowingly or recklessly caused bodily injury to another. BEING CONTRARY TO 18 Pa.C.S.A. §2701(a)(1). (M1)

COPY

A-7

FILED
 JUN 11 1997
 POTTER COUNTY
 PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
: OF POTTER COUNTY, PENNSYLVANIA
: CRIMINAL DIVISION
vs. :
MARK BAILEY : NO. 93 OF 1997

Criminal Information Continued:

(9) ENDANGERING WELFARE OF CHILDREN - Said actor, supervising the welfare of a child under 18 years of age, knowingly endangered the welfare of the child by violating a duty of care, protection or support. BEING CONTRARY TO 18 Pa.C.S.A. §4304(a). (F3)

(10) ENDANGERING WELFARE OF CHILDREN - Said actor, supervising the welfare of a child under 18 years of age, knowingly endangered the welfare of the child by violating a duty of care, protection or support. BEING CONTRARY TO 18 Pa.C.S.A. §4304(a). (F3)

(11) ENDANGERING WELFARE OF CHILDREN - Said actor, supervising the welfare of a child under 18 years of age, knowingly endangered the welfare of the child by violating a duty of care, protection or support. BEING CONTRARY TO 18 Pa.C.S.A. §4304(a). (F3)

(12) ENDANGERING WELFARE OF CHILDREN - Said actor, supervising the welfare of a child under 18 years of age, knowingly endangered the welfare of the child by violating a duty of care, protection or support. BEING CONTRARY TO 18 Pa.C.S.A. §4304(a). (F3)

All of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

Attorney for the Commonwealth

A-8

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF: **POTTER****POLICE
CRIMINAL COMPLAINT**

Magisterial District Number:

55-3-01

District Justice Name: Hon.

MICHELLE M. TASILLO

Address:

**110 NORTH EAST STREET
COUDERSPORT, PA**

Telephone: (814) 274-9411

16915Docket No.: **CR-039-97**Date Filed: **March 19, 1997**OTN: **E 640223-3**

COMMONWEALTH OF PENNSYLVANIA

VS.

DEFENDANT:

NAME and ADDRESS

**Mark Christopher BAILEY
7 Main St. P.O. Box 81
Roulette, PA. 16746**

Defendant's Race/Ethnicity <input checked="" type="checkbox"/> White <input type="checkbox"/> Asian <input type="checkbox"/> Black <input type="checkbox"/> Hispanic <input type="checkbox"/> Native American <input type="checkbox"/> Unknown	Defendant's Sex <input type="checkbox"/> Female <input checked="" type="checkbox"/> Male	Defendant's D.O.B. 06/24/70	Defendant's Social Security Number 198-64-4058	Defendant's SID
Defendant's A.K.A.	Defendant's Vehicle Information: Plate Number State Registration Sticker(MM/YY)		Defendant's Driver's License Number State	
			PA 23437636	
Complaint/Incident Number F2-547516	Complaint/Incident Numbers if other Participants			UCR/NIBRS Code 044

District Attorney's Office ☐ Approved ☐ Disapproved because: _____

(The district attorney may require that the complaint, arrest warrant affidavit, or both be approved by the attorney for the Commonwealth prior to filing. Pa.R.Cr.P. 107.)

(Name of Attorney for Commonwealth - Please Print or Type)

(Signature of Attorney for Commonwealth)

(Date)

I, Tpr. William L. DAWSON

(Name of Affiant - Please Print or Type)

3838

(Officer Badge Number/I.D.)

of Penna. State Police - Coudersport

(Identify Department or Agency Represented and Political Subdivision)

PAPSP1500

(Police Agency ORI Number)

(Originating Agency Case Number (OCA))

do hereby state: (check the appropriate box)

1. ☒ I accuse the above named defendant who lives at the address set forth above
☐ I accuse the defendant whose name is unknown to me but who is described as _____

☐ I accuse the defendant whose name and popular designation or nickname is unknown to me and whom I have therefore designated as John Doe

with violating the penal laws of the Commonwealth of Pennsylvania at the Borough of Coudersport

(Place/Political Subdivision)

and in Roulette Township

in Potter County on or about from 02/03/96 to 09/23/96

Participants were: (if there were participants, place their names here, repeating the name of above defendant)

Mark Christopher BAILEY

2. The acts committed by the accused were:

(Set forth a summary of the facts sufficient to advise the defendant of the nature of the offense charged. A citation to the statute allegedly violated, without more, is not sufficient. In a summary case, you must cite the specific section and subsection of the statute or ordinance allegedly violated.)

- (A) AGGRAVATED ASSAULT Citation: 18 Pa. C.S.A. 2702(a)(1); Grade: Felony One;

Penalty: 20 years/\$25,000.00

The defendant did, on or about 02/03/96 to 09/23/96, attempt to cause serious bodily injury to another, or caused such injury intentionally, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life, TO WIT: while living at the residence of Tammy Ann BAKER, P.O. Box 264 (4th St) in the Borough of Coudersport, Potter Co., Pa. from 02/03/96 to 09/10/96, the accused was responsible for causing two broken legs and a broken rib on Rebecca Lynn MOORE who's date of birth is 02/03/96. Rebecca is the daughter of Lorie Jean MOORE, the paramour of the accused. Also between 09/10/96 and 09/23/96, while living in Roulette Twp., Potter Co., Pa., the accused caused a third broken leg on Rebecca Lynn MOORE who was eight months old at the time.

(Continuation of No. 2)

POLICE
CRIMINAL COMPLAINT

Defendant's Name:	Mark Christopher BAILEY
Docket Number:	CR 039-97 / OTN: E 640223-3

(B) SIMPLE ASSAULT Citation: 18 PA. C.S.A. 2701 (a)(1); Grade: Misdemeanor One; Penalty: 5 years/\$10,000.00

The defendant did, on or about 02/03/96 to 09/23/96, attempt to cause or intentionally, knowingly or recklessly caused bodily injury to another, To WIT: while living at the residence of Tammy Ann BAKER, P.O. Box 264 (4th St) in the borough of Coudersport, Potter Co., PA. from 02/03/96 to 09/10/96, the accused caused bodily injury to Rebecca Lynn MOORE who's date of birth is 02/03/96. Rebecca is the daughter of Lorie Jean MOORE, the paramour of the accused. Also between 09/10/96 and 09/23/96, while living in Roulette Twp., Potter Co., Pa., the accused again caused bodily injury to Rebecca Lynn MOORE who was eight months old at the time.

(C) ENDANGERING WELFARE OF CHILDREN Citation: 18 PA. C.S.A. 4304; Grade: Felony Three; Penalty: 7 years/\$15,000.00

The defendant did, on or about 02/03/96 to 09/23/96, being a parent, guardian, or other person supervising the welfare of a child under 18 years of age, knowingly endanger the welfare of the child by violating a duty of care, protection or support, TO WIT: on three occasions between 02/03/96 and 09/10/96, while living at the residence of Tammy Ann BAKER, P.O. Box 264 (4th St) in the borough of Coudersport, Potter Co., Pa. the accused endangered the welfare of Rebecca Lynn MOORE, D.O.B. 02/03/96, by causing her to suffer three broken bones. Also between 09/10/96 and 09/23/96, while living in Roulette Twp., Potter County, PA., the accused again endangered the welfare of Rebecca Lynn MOORE, who was then eight months of age, by causing her to suffer another broken bone.

all of which were against the peace and dignity of the Commonwealth of Pennsylvania and contrary to the Act of Assembly, or in violation of

1. <u>2702</u> (Section)	<u>(a)(1)</u> (Subsection)	of the <u>Pa. Crimes Code</u> (PA Statute)	<u>4</u> (counts)
2. <u>2701</u> (Section)	<u>(a)(1)</u> (Subsection)	of the <u>Pa. Crimes Code</u> (PA Statute)	<u>4</u> (counts)
3. <u>4304</u> (Section)	<u>(a)</u> (Subsection)	of the <u>Pa. Crimes Code</u> (PA Statute)	<u>4</u> (counts)
4. _____ (Section)	_____ (Subsection)	of the _____ (PA Statute)	_____ (counts)

3. I ask that a warrant of arrest or a summons be issued and that the defendant be required to answer the charges I have made. (In order for a warrant of arrest to issue, the attached affidavit of probable cause must be completed and sworn to before the issuing authority.)
4. I verify that the facts set forth in this complaint are true and correct to the best of my knowledge or information and belief. This verification is made subject to the penalties of Section 4904 of the Crimes Code (18 PA. C.S. § 4904) relating to unsworn falsification to authorities.

March 19, 19 97

Wm. William L. Dawson
(Signature of Affiant)

AND NOW, on this date March 19, 19 97, I certify that the complaint has been properly completed and verified. An affidavit of probable cause must be completed in order for a warrant to issue.

Defendant's Name: Mark Christopher BAILEY

Docket Number: CR 039-97 / OTN: E 640223-3

POLICE
CRIMINAL COMPLAINT

AFFIDAVIT of PROBABLE CAUSE

On 10/18/96 I received a "Report of Suspected Child Abuse to Law Enforcement Official" report from Potter County Children and Youth Services. Dr. Mariam ASAR, a pediatrician from Coudersport was the reporter to Children and Youth.

Victim Rebecca Ann MOORE, D.O.B. 02/03/96, was taken to the office of Dr. Mariam ASAR in Coudersport, Pa. on 09/24/96, because her right leg was bruised and swollen. After examining Rebecca, Dr. ASAR sent Rebecca on to Charles Cole Memorial Hospital where she was X-rayed and examined by Dr. Robert SUPINSKI.

The X-rays that were taken on 09/24/96 of victim MOORE, showed that the victim was suffering from a fracture of the right distal tibial metaphysis. Further X-rays on that same day revealed that the victim sustained additional fractures in the past which consisted of a fracture of the right tibia, a fracture of the left tibia, and a fracture of a rib. All of the older fractures were in varying states of healing. These X-Rays were also reviewed with radiologists Dr. Louise DALLAIRE and Dr. Dane WALLISCH.

Accused BAILEY, D.O.B. 06/24/70, his girl friend Lorie Jean MOORE, who is the mother of the victim, the victim and two other children of Lorie MOORE'S all lived with Lorie's sister Tammy Ann BAKER, P.O. Box 264 (4th St.) Coudersport, PA. between November of 1995 and September 10, 1996. On September 10, 1996 they moved from the BAKER residence to the village of Roulette where they still reside.

On 02/28/97 accused BAILEY gave a signed statement in which he admits that he could have caused the victim's broken leg in September of 1996. Accused BAILEY was then interviewed by Tpr. Kenneth DAVIS, polygraph operator from PSP Montoursville. As a result of that interview the accused then gave a taped statement in the presence of this officer and Tpr. DAVIS in which he admitted to being responsible for all four broken bones that were suffered by victim MOORE. This tape has been entered into evidence. The accused also stated that he has a problem with anger control and at one time he was on medication for his temper.

I, Tpr. William L. DAWSON, BEING DULY SWORN ACCORDING TO
LAW, DEPOSE AND SAY THAT THE FACTS SET FORTH IN THE FOREGOING AFFIDAVIT ARE
TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

Wm. William L. Dawson
(Signature of Affiant)

Sworn to me and subscribed before me this 19th day of March, 19 97.

03-19-97 Date Michelle M. Lasille, District Justice

My commission expires first Monday of January, 2000

SEAL

FILE COPY

COMMONWEALTH OF
PENNSYLVANIA

:IN THE COURT OF COMMON PLEAS OF
POTTER COUNTY, PENNSYLVANIA

Vs.

:No. 93 of 1997

MARK BAILEY

:CRIMINAL DIVISION

POST-SENTENCE MOTION

AND NOW COMES the defendant, through his attorney Harold B. Fink, Jr., P.C., to move Your Honorable Court for a New Trial, or Motion for Judgment of Acquittal, or a Motion to Modify Sentence based on the following:

(1) Your Honorable Court erred in failing to grant the defendant's Motion to Dismiss the Complaint against the defendant based upon defendant's demurrer to the evidence.

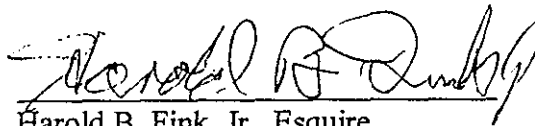
(2) Your Honorable Court erred in failing to enter a Judgment of Acquittal based upon the defendant's position that there was insufficient evidence outside of the testimony concerning the defendant's admissions and/or confessions to demonstrate to Your Honor that the crimes charged occurred more likely than not, and Your Honorable Court further erred in failing to grant the defendant's Motion to Dismiss based upon the

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defendant's position that under no circumstances could the jury have found, under the evidence presented and outside of the testimony the defendant's admissions and confessions, beyond a reasonable doubt that the crimes charged were committed.

(3) The sentence in the aggregate of 10 to 20 years was excessive.

RESPECTFULLY SUBMITTED,



Harold B. Fink, Jr., Esquire
Attorney for Defendant/Petitioner

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
: OF POTTER COUNTY, PENNSYLVANIA

VS. : NO. 93 OF 1997

MARK BAILEY : CRIMINAL DIVISION

ORDER

AND NOW, this 4th day of February 1998, the Defendant appearing before the Court following jury verdicts of guilty to various offenses, the Defendant is sentenced as follows:

As to Count 1, Aggravated Assault, the Defendant is sentenced to imprisonment with the Bureau of Corrections, Commonwealth of Pennsylvania for a term of not less than 5 nor more than 10 years.

As to Count 2, Aggravated Assault, the Defendant is sentenced to a term of imprisonment with the Bureau of Corrections, Commonwealth of Pennsylvania for a term of not less than 5 nor more than 10 years. It is Ordered that the sentences as between Counts 1 and 2 will be deemed consecutive in nature.

As to Counts 3 and 4, Aggravated Assault, the Defendant is sentenced to terms for each count of not less than 5 nor more than years imprisonment with the Bureau of Corrections, said sentences for said counts, however, to run concurrently as between themselves and concurrent to the sentences imposed at Counts 1 and

As to the four counts involving Simple Assault, the Court imposes no sentence, it appearing that the charges in question have merged into Aggravated Assault.

As to the four counts of Endangering the Welfare of Children, it is Ordered that the Defendant be sentenced to a term of

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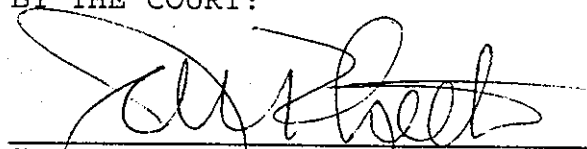
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CERTIFIED A TRUE COPY
DEAN M. HOWE
DEAN M. HOWE, PROthonary
CLERK-POTTER CO. PA

imprisonment of not less than 6 nor more than 24 months on each such count, concurrent as between all counts and concurrent with the sentences imposed for Counts 1 and 2.

It is further Ordered that the Defendant pay all costs of these proceedings and comply with all available programming for anger and violence management while incarcerated.

The defendant shall receive credit for all time served to date.

BY THE COURT:



JOHN B. LEETE, PRESIDENT JUDGE
55TH JUDICIAL DISTRICT

cc: D.A.
Harold B. Fink, Esq.
Probation
Sheriff

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
: OF POTTER COUNTY, PENNSYLVANIA

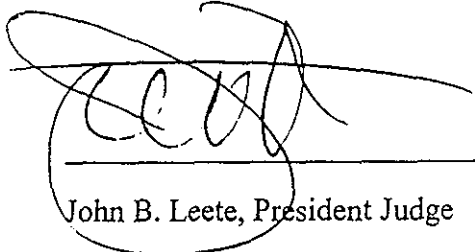
v. : No. 93 of 1997

MARK BAILEY : Criminal Division

ORDER

AND NOW, this 7 day of July 1998, the Post Trial Motion for a New Trial, a Judgment of Acquittal or a Sentence Modification in the above captioned matter is hereby denied.

BY THE COURT:



John B. Leete, President Judge

55th Judicial District

cc: District Attorney
Harold B. Fink, Esq. _____

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COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
: OF POTTER COUNTY, PENNSYLVANIA

v. : No. 93 of 1997

MARK BAILEY : Criminal Division

JUL 8 1998
AND NOW--
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Dean M. Dow
DEAN M. DOW, PROTH./
CLERK-POTTER CO. PA

OPINION AND ORDER ON POST TRIAL
MOTION ON BEHALF OF DEFENDANT MARK BAILEY

Before the Court is Defendant Bailey's Post Trial Motion for a New Trial, a Judgment of Acquittal or a Sentence Modification. The defendant alleges that there was insufficient evidence outside of the defendant's confessions to establish corpus delicti and that his sentence in the aggregate of 10 to 20 years was excessive.

The corpus delicti rule requires the Commonwealth to meet two distinct burdens. The first burden requires the Commonwealth to convince the Court by a preponderance of the evidence that the evidence independent of the defendant's confession shows a crime has occurred. See Commonwealth v. Ahlborn, 441 Pa. Super. 296, 301, 657 A.2d 518, 521 (1995); Commonwealth v. McMullen, 545 Pa. 361, ___, 681 A.2d 717, 722 (1996); Commonwealth v. Byrd, 490 Pa. 544, 556, 417 A.2d 173, 179 (1980). This is required to admit a defendant's confession into evidence. See id. The second burden requires the Commonwealth to convince the jury beyond a reasonable doubt that the evidence independent of the confession shows that a crime has occurred. See Ahlborn, 441 Pa. Super. at 302, 657 A.2d at 521; Commonwealth v. Fried, 382 Pa. Super. 156, ___, 555 A.2d 119, 120 (1989). This is to allow the jury to consider the confession as evidence of the defendant's guilt. See id. The Commonwealth is not required to prove the identity of the person responsible for the crime and may use circumstantial evidence to prove corpus delicti. See Commonwealth v. Persichini, 444 Pa. Super. 110, ___, 663 A.2d 699, 702 (1995), appeal granted in part, 546 Pa. 595, 687 A.2d 819 (1997).

In this matter, the Commonwealth has clearly met both burdens. It offered three expert witnesses to establish the corpus delicti of the crimes of endangering welfare of children and aggravated assault. All three experts testified that the victim's injuries were highly consistent with child abuse. In support of this conclusion, the witnesses pointed to various factors. Dr. Dellaire, a

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radiologist, and Dr. Supinski, an orthopedic surgeon, both testified as to the number and age of the child's fractures. Supinski testified that the victim had sustained at least six separate fractures at various times throughout a time period greater than four weeks. These fractures included two in the child's right ankle which were less than two weeks old. They also included fractures in both the right and left lower leg which were 3 to 6 weeks old and two fractured ribs which were greater than six weeks old. Dellaire testified that the child suffered at least five fractures. These included one in the child's right ankle, which was less than 2 weeks old, and fractures in the left ankle, right lower leg, right rib and left rib all of which were between one month and two months old in Dellaire's opinion.

Dellaire and Dr. Asar, a pediatrician, testified that the types of fractures led them to the conclusion that the injuries were consistent with child abuse. Both testified generally about their medical training in child abuse and particularly that the child's "corner" fractures in her ankles and rib fractures are taught to be highly consistent with child abuse unless explained otherwise.

Supinski testified as to the most likely causes of the injuries. Supinski first dismissed disease and vitamin deficiency as the likely sources of the fractures. He stated that the fractures of the victim's right ankle were most likely caused by traction, possibly by shaking the child. In Supinski's opinion, the remaining four fractures were most likely caused by direct blows each requiring 10 to 20 pounds of force. He testified that because this amount of force is greater than the muscle strength in the 6th to 7th month of age group, the non-ambulatory child was physically unable to injure herself in this manner. Based upon this, Supinski concluded based upon a reasonable degree of medical certainty that the child "was undergoing abuse and has had multiple injuries inflicted upon it by some other person or persons."

Finally, all three witnesses testified that the history given to the medical personnel was inconsistent with the child's right ankle fracture that prompted the child's mother to take the child to Asar. The explanation given for the fracture was that a sibling had fallen on the child's leg. Supinski testified that this explanation was not consistent with the type of fracture the child sustained. Asar testified that the child's mother gave her the impression that the injury happened the same day she sought medical assistance and that it later became known that the injuries occurred four days earlier.

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The corpus delicti requirement for the crime of endangering welfare of children has been met. "A parent, guardian, or other person supervising the welfare of a child under 18 years of age commits an offense if he knowing endangers the welfare of the child by violating a duty of care, protection or support." 18 Pa. Cons. Stat. Ann. § 4304(a) (West Supp. 1998). The doctors' testimony showed that the person responsible for supervising the child either inflicted multiple injuries to the child or neglected the child to the extent that somebody else was able to do so. This is sufficient to convince the Court by a preponderance of the evidence and the jury beyond a reasonable doubt that the injuries resulted from a violation of a duty of care or protection. By violating either of these duties, the supervising adult would be practically certain that his or her conduct was endangering the welfare of the child.

The corpus delicti was also established for aggravated assault. A person is guilty of aggravated assault if he or she "attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under conditions manifesting extreme indifference to the value of human life." 18 Pa. Cons. Stat. Ann. § 2702(a)(1) (West Supp. 1998). Serious bodily injury is defined as, "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa. Cons. Stat. Ann. § 2301 (West Supp. 1998). The expert testimony established that the child suffered serious bodily injury. The 4 1/2 to 7 1/2-month-old child sustained at least five fractures over the course of more than four weeks. Two of these fractures were in the child's ribcage close to her lungs. This period of repeated injury to the child's fragile body was sufficient for the Court to conclude by a preponderance of the evidence and the jury to conclude beyond a reasonable doubt that the child faced a substantial risk of death.

The independent evidence also supports the Court's ruling by a preponderance of the evidence and the jury's finding beyond a reasonable doubt that someone at least recklessly caused the serious bodily injury to the child. That Dellaire's and Azar's definitions of child abuse did not exclude accidental and non-criminal causes is not determinative. It is not necessary for the Commonwealth to rule out all possibility that the act occurred by accidental or non-criminal means for the jury to find

that corpus delicti was established beyond a reasonable doubt. See *Ahlborn*, 441 Pa. Super. at 303, 657 A.2d at 522. The detailed testimony relating to the child's injuries, along with the inconsistent explanation given about the source of the most recent injury, was more than sufficient for the jury to be convinced beyond a reasonable doubt that the source of the child's injuries was neither accidental nor non-criminal.

The defendant also alleges that his sentence in the aggregate of 10 to 20 years was excessive. The defendant was convicted of four counts of aggravated assault and four counts of endangering welfare of children. For counts 1 and 2 of aggravated assault, the defendant was sentenced to two 5 to 10 year consecutive terms. For counts 3 and 4 of aggravated assault, the defendant was sentenced to two 5 to 10 year terms to run concurrent with each other and with the sentences for counts 1 and 2. For each count of endangering welfare of children, the defendant was sentenced to a term of 6 to 24 months to also run concurrent with counts 1 and 2 of aggravated assault.

The defendant's sentence in the aggregate of 10 to 20 years was not excessive. The sentence was within the guidelines set forth by the Commonwealth of Pennsylvania Commission on Sentencing which suggest a minimum term of 42 to 60 months for aggravated assault where the defendant caused serious bodily injury. 204 Pa. Code. § 303.15-303.16 (1997). Further, because the victim was younger than 13 years old, each count of aggravated assault carried with it a mandatory sentence of at least five years. 42 Pa. Cons. Stat. Ann. § 9718(a)(2) (West. Supp. 1998). Finally, it is well settled that a trial judge has the discretion to determine whether a particular sentence should be consecutive to or concurrent with other sentences being imposed. See *Commonwealth v. Hoag*, 445 Pa. Super. 455, 665 A.2d 1212, 1213-1214 (1995).

Accordingly, the Court enters the following Order:

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COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
: OF POTTER COUNTY, PENNSYLVANIA

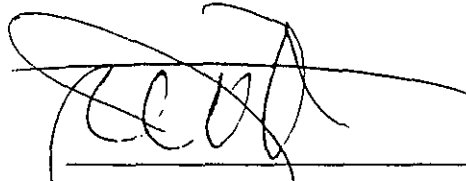
v. : No. 93 of 1997

MARK BAILEY : Criminal Division

ORDER

AND NOW, this 7 day of July 1998, the Post Trial Motion for a New Trial, a Judgment of Acquittal or a Sentence Modification in the above captioned matter is hereby denied.

BY THE COURT:



John B. Leete, President Judge
55th Judicial District

cc: District Attorney
Harold B. Fink, Esq.

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SAMUEL C. STRETTON

ATTORNEY AT LAW

301 S. HIGH STREET

P.O. BOX 3231

WEST CHESTER, PA 19381-3231

(610) 696-4243

FAX: (610) 696-2919

THE VERSAILLES

1530 LOCUST ST., OFFICE D

S.E. CORNER 16TH AND LOCUST STS.

PHILADELPHIA, PENNSYLVANIA 19102

(215) 735-5583

September 16, 1998

PLEASE REPLY TO:

West Chester

David A. Szewczak, Prothonotary
Superior Court of Pennsylvania
1015 Grant Building
330 Grant St.
Pittsburgh, PA 15219

Re: Commonwealth of Pennsylvania vs. Mark Bailey
No. 1451 PGH 1998

Dear Mr. Szewczak:

Please be advised I represent Mark Bailey in the above matter. I have enclosed the original and one copy of my Entry of Appearance. Attached to that is my Proof of Service. I would ask your assistance in filing this of record. Please advise me if there is a briefing schedule or if any documents are due into the Court. Thank you.

Very truly yours,


Samuel C. Stretton

SCS:das

enc.

cc: Honorable John M. Leete
Jeffrey Leber, Esquire
H.B. Fink, Esquire
Mark Bailey
Martha Bailey

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IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : SUPERIOR COURT NO.
1451 PGH 1998

VS.

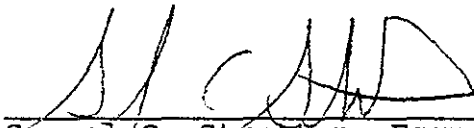
MARK BAILEY

ENTRY OF APPEARANCE

TO THE PROTHONOTARY:

Please enter the appearance of Samuel C. Stretton,
Esquire, on behalf of Mark Bailey in the captioned appeal.

Respectfully submitted,


Samuel C. Stretton, Esquire
Attorney for Mark Bailey
301 S. High St.
P.O. Box 3231
West Chester, PA 19381
(610) 696-4243
Attorney I.D. No. 18491

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Sony Micro Cassette Tape w/Statement of MARK CHRISTOPHER BAILEY

Taken on 02/28/97

Transcribed on 03/12/97

Tpr. William L. Dawson

Incident No. F2-547516

Property Log No. F2-2619

Charges:

Aggravated Assault

Simple Assault

Endangering Welfare of Children

DAWSON: For the record, today's date is February 28, 1997, and it is now 1544 in the afternoon. Also, could you tell us how long you've lived at the address you just mentioned there in Roulette?

BAILEY: Approximately 8 months.

DAWSON: OK. Prior to that where did you live?

BAILEY: 312 North Main Street, Coudersport.

DAWSON: Whose residence is that?

BAILEY: Tammy Baker.

DAWSON: And what relation is Tammy to any of you?

BAILEY: Uh, my girlfriend's sister.

DAWSON: Mark, the records, the doctor's reports states that Rebecca Moore had suffered a broken leg, a broken right leg and this was reported to the doctor on the 24th of September, 1996, when Rebecca was taken to the doctor's by yourself and Laurie Moore. Is that correct?

BAILEY: Yeah.

DAWSON: Could you tell us what may happened that would've caused that particular injury to Rebecca?

BAILEY: I was holding up above my head in one hand, playing around with her, she started to fall so I grabbed her leg and caught her with my other arm and pulled her into my chest so she wouldn't hit the floor.

DAWSON: OK, and as a result of that, it sounded like it was an accidental type thing. Is that correct?

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BAILEY INTERVIEW
PAGE 2

BAILEY: Yes, it was.

DAWSON: And as a result of that, do you think Rebecca could have been injured?

BAILEY: She could have been, yeah.

DAWSON: OK. Do you know or recall when that would have taken place?

BAILEY: Uh, the 23rd of September.

DAWSON: And how do you know it would have been the 23rd of September?

BAILEY: Uh, because it happened just a little while before I had to leave for work.

DAWSON: OK. And at this time when you mentioned the 23rd of September, are you looking at a calendar page or something?

BAILEY: Yeah. Yes, sir.

DAWSON: And that calendar page is from September of 1996. Is that correct?

BAILEY: Yes.

DAWSON: And that helps refresh your memory?

BAILEY: Yes.

DAWSON: OK, and Rebecca was taken to the doctor's office on the 24th of September of 1996, she was examined at the office of Dr. Azar. Is that correct?

BAILEY: Yeah, we stopped there before we took her to the hospital.

DAWSON: OK, and when she was taken to - is that Charles Cole Hospital?

BAILEY: Yeah.

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BAILEY INTERVIEW
PAGE 3

DAWSON: In Coudersport?

BAILEY: Yeah.

DAWSON: Who examined her then?

BAILEY: I have no idea.

DAWSON: OK. As a result of that examination, it was learned that Rebecca had, in addition to the current injury of that day, had sustained two prior broken legs and a broken rib. Is that correct?

BAILEY: As far as I know, yeah.

DAWSON: OK. Do you have any idea, can you tell us what may have caused the injury to the rib?

BAILEY: Uh, being upset, picked her up too hard.

DAWSON: OK. Who - who was upset?

BAILEY: I was.

DAWSON: OK, and who picked her up?

BAILEY: I did.

DAWSON: And what were the circumstances surrounding that? Where did it happen and, uh...

BAILEY: At Tammy Baker's house in Coudersport.

DAWSON: OK, and was there anything going with Rebecca that may have caused you to be upset?

BAILEY: Not with Rebecca herself. She was crying; I was already upset. I should've just stayed away.

DAWSON: OK. Where was Rebecca at that time?

BAILEY: She was in her crib?

DAWSON: OK. Is that a separate bedroom that she had?

BAILEY: No, she was in the same room with her mother.

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BAILEY INTERVIEW
PAGE 4

DAWSON: Was there anybody with you in the room when you picked her up?

BAILEY: No, I don't believe so.

DAWSON: And how - could you describe to us how it was that you picked her up?

BAILEY: Well, I picked her up - I picked her up like you would normally pick up a child, but with me being angry, I probably squeezed just a little too tight.

DAWSON: Do you think it's possible as a result of that that the injury to the rib could have taken place?

BAILEY: Yeah.

DAWSON: How about the other two prior injuries to her leg? Can you tell us how you think they may have happened?

BAILEY: Yeah, one of them may have happened when I dragged her out of the car. I was upset; bad day. Instead of being easy, I just grabbed the car seat and her leg was up against the car seat when I grabbed it and I just grabbed and pulled the car seat out so I could get her out of the car and get her into the house and that was apparently the result of another injury.

DAWSON: Had something taken place in the car that maybe caused you to be upset at that point?

BAILEY: Jennifer had got sick and was fussing and that didn't help me out any with being of sound mind.

DAWSON: OK, and where did that happen at? Where was the car at at that time?

BAILEY: It was at Tammy's house in Coudersport.

DAWSON: So, so far you've talked about two leg injuries and one rib injury. There's still another leg injury that perhaps you would know something about that also?

BAILEY: Yes...

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BAILEY INTERVIEW
PAGE 5

DAWSON: Can you tell us anything?

BAILEY: It could have happened when I went to pick her up out of the crib, her leg was between the bars and I picked her up and when I picked her up, her leg got caught and it...I mean, it vibrated the whole crib and that apparently was another result of a fracture.

DAWSON: OK, and where did that happen?

BAILEY: At Tammy's house.

DAWSON: Just for the record, the first injury that we discussed when you had Rebecca above your head holding her with one hand, where were you when that happened?

BAILEY: That was, if I remember correctly, was in Roulette.

DAWSON: OK. The last incident we - you talked about there when you picked Rebecca up out of the crib and her leg was caught between the slats of the crib, were you upset at that time?

BAILEY: Yeah.

DAWSON: What was that about, do you remember?

BAILEY: No, I don't remember exactly what I was upset about. I get upset over little, tedious things that I shouldn't get upset about. I just fly off the handle over ridiculous things.

DAWSON: Earlier today, Mark, you and I had a discussion and you gave me a statement prior to this one on tape and during that earlier statement you mentioned to me that you had problems with temper control and so on. Is that correct?

BAILEY: Yeah.

DAWSON: Have you ever been treated for that?

BAILEY: Yeah.

DAWSON: And where were you treated?

BAILEY: Bradford Hospital.

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BAILEY INTERVIEW
PAGE 6

DAWSON: And did you...were you confined there as a patient at times?

BAILEY: Yeah.

DAWSON: Do you remember when that was?

BAILEY: I believe it was in May of '96. It may have been May of '95.

DAWSON: And have you ever taken medication for temper problems?

BAILEY: Yes.

DAWSON: Do you recall what that was?

BAILEY: I believe it's (inaudible).

DAWSON: And how long did you take that?

BAILEY: I took that for probably 5 months and then I just stopped taking it.

DAWSON: When did you stop taking it? How long ago?

BAILEY: Probably a year, a year and a half.

DAWSON: In the recent months, have you made any contact with anyone about getting help with your temper problems again?

BAILEY: Yes.

DAWSON: And who was that?

BAILEY: Uh, Coudersport Guidance Center. Uh, to see a Pat Rupert.

DAWSON: And have you had an appointment with Pat Rupert?

BAILEY: I did, but I had to cancel it because I had fallen the day before and broke my right arm.

DAWSON: OK, and you mentioned to me that you planned on recontacting her for a future appointment. Is that correct?

BAILEY: Yes.

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BAILEY INTERVIEW

PAGE 7

DAWSON: Have you had problems with keeping your temper with anyone else other than Rebecca?

BAILEY: Yes, my ex-girlfriend, Jodi Lynn Murray.

DAWSON: Where does Jodi live?

BAILEY: Bradford.

DAWSON: How about with your present girlfriend?

BAILEY: Yes. I hit her once when I was at a friend's house, we were drinking. They called Jodi in Bradford, was causing trouble and I got upset and I smacked Laurie.

DAWSON: How about with any other children? Have you ever lost your temper with any of the other children in your household?

BAILEY: I haven't really lost my temper. I've got angry and yelled at them. That's about it.

DAWSON: Mark, a while back there's another young girl in the house, I believe she just turned 2 years of age by a...her name was Jennifer? Was it?

BAILEY: Yeah.

DAWSON: Jennifer had been taken to Dr. Azar's office a while back for black and blue marks on her ears. Are you familiar with that?

BAILEY: Yeah.

DAWSON: Do you have any idea what would have caused those black and blue marks?

BAILEY: The only thing that I figure could have caused them was the car seat she was in. She was too big for and the seat belts were hitting her ears. And that was basically the only time that she would get them that I can recall was getting in and out of the car.

DAWSON: There was nothing ever on your part that would have caused those marks on her ears?

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BAILEY INTERVIEW
PAGE 8

BAILEY: No.

DAWSON: Trooper Davis, have anything to say that you should add or you can think of?

TPR. DAVIS: Just wondering if any (several words inaudible) indicated you played a little too rough with the inside of the hand or (inaudible) results of that horseplay, even though it might have been an accident, Laurie told me earlier in the day this time (inaudible) kid's ears (inaudible) in a joking manner (several words inaudible) black and blue marks or whatever. Did anything like that ever happen (inaudible)?

BAILEY: Yeah, the only one that ever happened with was Allen when we played around I'd pick on him about his ears 'cuz he always gets his hair cut short and there's times that, you know, we get horsing around, I'll grab his ears, but not with Jennifer. I...

TPR. DAVIS: Anything that might have left a mark, even accidental?

BAILEY: No.

DAWSON: OK. Anything else at all that you want to tell us or that or that you can think of that would help us at all here today?

BAILEY: No, I told everything that I know, except for that I need help.

DAWSON: Are you sorry for what has happened to Rebecca or for anything thing that has happened?

BAILEY: Very fucking sorry. I just don't want it to happen again.

DAWSON: I know. And Mark, we don't want it to happen again, either, so we'll try to do what we can to help you, OK? It's uh, now about 1553 hours on February 28, 1997, and we'll conclude this interview at this time.

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COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
: OF POTTER COUNTY, PA

VS. : NO. 93 OF 1997

MARK BAILEY,

: CRIMINAL DIVISION

Defendant

PARTIAL TRANSCRIPT OF THE JURY TRIAL, held before the
Honorable John B. Leete, President Judge, in the
Courthouse, Coudersport, PA, on December 12, 1997.

A P P E A R A N C E S:

OFFICE OF THE DISTRICT ATTORNEY
OF POTTER COUNTY
Coudersport, PA 16915
BY: JEFF LEBER, D.A.
For the Commonwealth

FINK & FINK,
Attorneys at Law
Main Street
Port Allegany, PA 16743
BY: HAROLD B. FINK, ESQ.
For the Defendant

Ann Marie Jusko
Potter County Court Reporter
Potter County Courthouse
Coudersport, Pa 16915

COPY

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FOR THE COMMONWEALTH

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1 M A R Y L S T O R E Y, having been duly sworn, was examined
2 and testified as follows:

3

4 DIRECT EXAMINATION BY MR. LEBER:

1 5 Q Would you tell us your name and address?

6 A Maryl Storey, Coudersport Pennsylvania.

2 7 Q What is your occupation?

8 A X-ray tech.

3 9 Q And where are you employed?

10 A Charles Cole Hospital.

4 11 Q And how long have you been employed there?

12 A 29 years.

5 13 Q And were you employed there in September of 1996?

14 A Yes, sir.

6 15 Q September 24th of 1996 did you have occasion to
16 take x-rays of a child?

17 A Yes, sir.

7 18 Q And what was the name of that child?

19 A Rebecca Moore.

8 20 Q Do you know what the date of birth of that child
21 was from what you determined?

22 A Not without seeing the x-rays.

9 23 Q I'm going to show you, Mrs. Storey, what are
24 marked as Commonwealth Exhibits 1, 2 and 3 and ask if you can
25 identify those please?

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1 A Yes, these are x-rays that were taken on September
2 24th, 96.

0 3 Q And the person who was x-rayed at that time was
4 whom?

5 A Rebecca Moore, birth date 2/3/96.

1 6 Q February 3rd, 1996 is her date of birth and again
7 the date those x-rays were taken is what?

8 A September 24, 1996.

2 9 Q And those x-rays, that's a copy of the x-ray
10 that's actually held by the hospital or Dr. Dallaire at this
11 time?

12 A That's correct.

3 13 Q And those are accurate depictions of the x-rays
14 taken on those particular days?

15 A Yes.

16 MR. LEBER: Nothing else thank you.

17 THE COURT: Mr. Fink.

18 MR. FINK: I wish I could think of some
19 questions to ask you, just a couple.

4 20 Q You identified those x-rays which were shown to
21 you as being those of taken of Rebecca Moore and you knew
22 that to be true because Rebecca Moore's name is on those
23 x-rays?

24 A Yes, they are, sir.

5 25 Q And the date which they were taken is also on

A-35

1 those?

2 A Correct.

3 MR. FINK: Nothing further, thank you, ma'am.

4 MR. LEBER: Janie Murphy.

5

6 J A N I E M U R P H Y, having been duly sworn, was examined
7 and testified as follows:

8

9 DIRECT EXAMINATION BY MR. LEBER:

6 10 Q Your name and address please?

11 A Janie Murphy, Coudersport, Pennsylvania.

7 12 Q What's your operation?

13 A X-ray technologist.

14 Q How long have you been engaged in that occupation?

15 A About 18 years.

9 16 Q Where were you employed in September of 1996?

17 A Charles Cole Memorial Hospital.

0 18 Q Charles Cole Memorial Hospital here in

19 Coudersport; is that correct?

20 A Yes.

1 21 Q And what department did you work in in September
22 of 1996?

23 A Radiology.

2 24 Q Now, I'm going to ask you--I should have asked

25 Miss Storey she's identified exhibits 1, 2 and 3 being x-rays

A-36

1 she took on a certain date. Do the x-rays, these exhibits 1,
2 2 and 3 indicate the time at which the x-rays were taken?

3 A Yes.

3 4 Q And is that shown on every x-ray plate that you
5 have?

6 A Yes.

4 7 Q Can you tell us from examining 1, 2 and 3 at what
8 hour those particular x-rays were taken?

9 A 2:39 in the afternoon.

5 10 Q Okay 2:39?

11 A Hm-hmm.

6 12 Q And the next one?

13 A 2:41, 2:59.

14 Q Miss Murphy, I'll show you these items marked as
15 exhibits, Commonwealth Exhibits 4 and 5 ask if you can
16 identify them for us, please?

17 A Yes, I can.

8 18 Q And what are they?

19 A It's pelvis and lower extremities.

9 20 Q They are x-ray plates; is that correct?

21 A Yes.

22 Q And those x-rays were taken by whom?

23 A Myself.

1 24 Q And who is the subject of those x-rays?

25 A Rebecca Moore.

A-37

2 1 Q And is the date of birth of that child indicated?

2 A Yes, it is, 2/3/96.

3 3 Q Now, with x-rays--

4 MR. FINK: If Your Honor, please, I'll object
5 to the date of birth of the child that's hearsay. Whatever
6 it's worth it's certainly hearsay and cannot be proven
7 through this means.

8 MR. LEBER: I can rephrase that, Your Honor.

9 THE COURT: Thank you.

4 10 Q By the exhibits that you have in front of you does
11 that indicate what the date of birth of that child is?

12 A Yes, it does.

13 MR. FINK: Objection.

14 THE COURT: Overruled as to that particular
15 question.

5 16 Q And what is the birth date indicated?

17 A 2/3/96.

18 MR. FINK: Objection.

19 THE COURT: Without some foundation I guess
20 have to sustain the objection.

6 21 Q Whenever you take an extra of an individual is it
22 usual procedure to indicate the birth date of the subject of
23 the x-ray?

24 A That's right.

7 25 Q And how is it that you obtain the information

A-38

1 regarding the birth date of the child or of the subject?

2 A Whoever is giving the information, could be from a
3 nurse or the mother, whoever is with the child.

8 4 Q Now, the sticker on there that indicates 2/3/96 is
5 the date of birth. From whom did you obtain that
6 information?

7 MR. FINK: Judge, it's the same objection.
8 Forget the objection. Go ahead, put it in that way. It's
9 objectionable but go ahead.

10 MR. LEBER: Thank you.

9 11 Q Okay I guess we can move on then. After x-rays
12 are completed do you read the x-rays?

13 A No.

14 Q And who in the realm of the hospital is
15 responsible for reading x-rays?

16 A The radiologist.

1 17 Q And who requested these particular x-rays if you
18 recall?

19 A I believe it was Dr. Asar.

2 20 Q And Dr. Asar's specialty is what?

21 A Pediatrician.

3 22 Q Now, what time of day was it whenever you took
23 these particular x-rays?

24 A This was at 1445.

4 25 Q 1445 means around 2:00?

A-39

1 A Hm-hmm.

2 Q 2:45 p.m., is that correct?

3 A Yes.

4 Q I want you to look at these earlier x-rays maybe
5 look at them little bit more closely and examine the time
6 indicated on them. You indicated those were 2:39 something
7 like that?

8 A I'm sorry it is 12 there is a one in front of
9 them.

10 Q So these were 12:39, 12:45; is that right?

11 A Right.

12 Q Those were the x-rays taken by Nurse Storey?

13 A That's correct.

14 MR. LEBER: Nothing else.

15 THE COURT: Defense may cross.

16 MR. FINK: No questions.

17 MR. LEBER: Dr. Dallaire, please.

18

19 L O U I S E D E L L A I R E, having been duly sworn, was
20 examined and testified as follows:

21

22 DIRECT EXAMINATION BY MR. LEBER:

23 Q Your name and address please?

24 A Louise Dallaire, Allegany, New York.

25 Q What's your occupation?

A-40

1 A I'm radiologist.

2 Q And what kind of training does a radiologist
3 require?

4 A Four years of medical school, four years of
5 residency.

6 Q So what degrees do you hold?

7 A I hold Bachelor of Science Degree and an M.D.
8 Degree.

9 Q Your Bachelor of Science is from what institution?

10 A University of Buffalo.

11 Q Your M.D. Degree is what from where?

12 A University of Buffalo also.

13 Q When did you graduate from the University of
14 Buffalo?

15 A Undergraduate 1972.

16 Q Your graduate degree as a medical doctor?

17 A 1976.

18 Q And what training have you had subsequent to
19 obtaining your degree? Since you obtained your degree what
20 training have you had?

21 A I had one year rotating internship and three years
22 of radiologist residency.

23 Q And what is a radiologist?

24 A Radiologist is one who interprets x-rays in its
25 loose sense, although there are a lots more than x-rays done

A-41

1 right now in that field.

2 Q Are you a member of any boards or admitted to
3 practice with any state boards of medical examiners?

4 A I'm licensed to practice in Pennsylvania and New
5 York currently.

6 Q Are you again member of any society or other
7 boards?

8 A I'm member of the Pennsylvania Medical Society
9 A M A and various other boards.

10 Q And how long have you been actually actively
11 practicing your profession as a radiologist?

12 A Since 1980.

13 Q What hospitals do you have privileges with?

14 A Currently just Charles Cole Hospital.

15 Q In the past what hospitals have you had privileges
16 with?

17 A It would be impossible for me to tell you the
18 numbers I was associated with. I was in the Navy and N C
19 Bremington where I worked for two years. I was a radiologist
20 in Alaska, Kaiskag General Hospital for three or four years.

21 Q So you've had a lot of experience?

22 A Yes, sir.

23 MR. LEBER: Your Honor, I'm going to be
24 offering Dr. Dallaire as an expert in radiology.

25 MR. FINK: We think under the law of

A-42

1 Pennsylvania she is qualified as a radiologist under the
2 testimony. We have no objection.

3 THE COURT: Very well, we will receive Dr.
4 Dallaire as an expert witness in the field of radiology.

5 Q Dr. Dallaire, in September of 1996 were you
6 employed in Charles Cole Memorial Hospital?

7 A I was working at Charles Cole Hospital. I'm not
8 Charles Cole employee.

6 9 Q And on the 24th day of that month, September of
10 1996 did you have occasion to examine x-rays that purportedly
11 were x-rays taken of a subject by the name of Rebecca Moore?

12 A Yes, I did.

7 13 Q How was it that this case came to your attention?

14 A I believe x-rays were brought to me perhaps by
15 Miss Storey. I'm not sure who brought them to me. She's the
16 one who took the initial films because Dr. Asar wanted to be
17 called about a reading of the films.

8 18 Q When a x-ray technician takes an x-ray what is the
19 procedure generally from that point?

20 A In this particular case they were brought for
21 verbal report, but often times they're just put aside and
22 read at a later time of day.

9 23 Q I'm going to show you these exhibits which are
24 have been marked Commonwealth's Exhibits I'll give you all of
25 them, 1 through 5, and ask if you can identify them please?

A-43

1 A These appear all to be copies of x-rays taken of
2 Rebecca Moore.

3 Q And you have the original of these x-rays; is that
4 correct?

5 A Yes, I do.

6 Q Now, at first what part of the subject's body were
7 you examining or x-rays of which part of the subject's body
8 to determine her condition?

9 A I was brought x-rays of the right lower leg.

10 Q And did you examine those x-rays?

11 A Yes, I did.

12 Q And those are among the five that we have here
13 before us?

14 A I believe so.

15 Q And what was your conclusion to a reasonable
16 degree of medical certainty relative to the right leg of this
17 child?

18 A That there were fractures.

19 Q And what fractures did you observe? Can you
20 describe them to us?

21 A There were fractures of the lower ends of the
22 right lower leg around the ankle. There were what's called
23 bucket handle fractures or corner fractures. And these
24 fractures are considered fairly specific for child abuse.
25 There was also a healing fracture of the shaft of one of the

A-44

1 legs, of one of the bones in the lower leg.

2 Q Now the first fracture you mentioned you talked
3 about a bucket handle fracture describe that for the jury as
4 best you can.

5 A It's basically just a thin rim of bone right next
6 to the growth plate.

7 Q And when you examined an x-ray plate and in this
8 circumstance were you able to give some kind of estimate as
9 to the age of the fracture?

10 A Yes, the fractures that I initially described as
11 bucket handle those appeared relatively new, within two weeks
12 of age.

13 Q The first and the fresh fracture that you noted
14 tell the jury as precisely you can where that was located?

15 A The initial fracture.

16 Q Right the freshest one?

17 A The distal end of the tibia.

18 Q Distal end of the tibia is what in layman's terms?

19 A Right above the ankle, the main bone..

20 Q Now you said you observed another fracture. Where
21 was that other fracture?

22 A The older fracture along the shaft of that same
23 bone.

24 Q Okay.

25 A Higher up.

A-45

3 1 Q This child was less than 8 months old at that
2 time. What about the quality of the bone of the child of
3 that age? Is it something that is easily broken?

4 MR. FINK: I'm going to object to that I
5 don't know whether that's properly within the scope of the
6 expertise of the witness.

7 THE COURT: I will ask counsel to clarify
8 through appropriate questions if that is within the range.

9 MR. LEBER: Okay.

4 10 Q In the course of your training as a radiologist
11 tell us what training you have relative to what would relate
12 to the strength of bones and how it relates to people of
13 different ages and so forth?

14 A I'm not sure what you mean by training
15 specifically. Young people's bones tend to to be more
16 flexible than older peoples.

17 MR. FINK: Objection the witness is seemingly
18 giving substantive testimony within--

19 THE COURT: Sustained.

5 20 Q Dr. Dallaire, I have to qualify you relative to
21 your experience and background and training relative to
22 understanding the dynamics of a broken bone and how--

23 MR. FINK: I'm going to object can he just
24 ask the question.

25 THE COURT: Overruled.

A-46

Q Relative to again your training and so forth to understand the dynamics involved with bones generally and the way they grow, their strength and so forth. So again my question goes specifically what your training is relative to that, through the course of your medical school, your internship and so forth and your experience?

A Well, we're trained in the physiology of bone, the way bones grow. In terms of radiologist we see, you know, pediatrics as part of the formal training.

Q And did you have formal training in pediatrics?

A As part of the general radiology residency.

Q And that was when?

A 1977 to 1980.

Q Your residency again was in Buffalo; is that correct?

A My residency was from Massachusetts.

Q And during the course of your approximately 17 years of experience have you had other occasions when you examined the x-rays of the bones of small children?

A Yes, I have.

Q And have you through your experiences gained insight into the nature of the bones of children?

A Yes.

Q So what is the difference between bones of a child and bones of a person whose more advanced in years?

A-47

1 A Bones of a child are more flexible. They're not
2 fully formed, they need room to grow. So the edges of it are
3 made so they can grow at the end.

3 4 Q What does that mean in terms of the likelihood of
5 those bones breaking?

6 A Well, the fractures that I described there are
7 certain points at which they may break under certain
8 conditions.

4 9 Q Now, you've described the right leg of what you've
10 observed as a fresh fracture and older fracture. After you
11 viewed those x-rays, made those determinations, did you
12 report that to Dr. Asar?

13 A I had asked for a comparison of the other side.

14 Q So additional x-rays were taken; is that correct?

15 A That's right.

6 16 Q And those are again Exhibits 1 through 5?

17 A I believe so.

7 18 Q And those were taken by Nurse Murphy; is that
19 correct?

20 A I think those were still taken by Maryl Storey.

21 MR. FINK: Your Honor, I must object to the
22 leading nature of the--

23 MR. LEBER: I'm trying to move it along.

24 THE COURT: We're fairly leading.

8 25 Q I'll show you Exhibits 4 and 5. Those were

A-48

1 identified as taken by x-ray technician?

2 A These were taken by Miss Murphy. These were taken
3 later.

9 4 Q And again did you compare them with the earlier
5 x-rays?

6 A These were not the ones I was just referring to.

0 7 Q The purpose of these later ones was what as far as
8 you know?

9 A I requested the comparison of the left leg as is
10 fairly common practice to do when I'm examining extremities
11 of children. These other ones I believe were taken at Dr.
12 Asar's request after I gave her a verbal report on the phone.

1 13 Q Did you obtain a comparison of the left leg?

14 A Yes, we did.

2 15 Q What did that reveal to you?

16 A That there was an older fracture around the left
17 ankle and around the shaft of the tibia on the left side.

3 18 Q Now the exhibits that you have before you that are
19 numbered 4 and 5 you said those were taken at the request of
20 Dr. Asar; is that correct?

21 A I believe so.

4 22 Q Did you examine those x-rays after they were
23 received?

24 A Yes, I did.

5 25 Q And what was the purpose of taking those x-rays?

A-49

1 A Well once the specter of child abuse was raised in
2 this case it is common to take additional films to see
3 whether there might be other fractures.

6 4 Q What did you find upon examination of these
5 further x-rays?

6 A That there were two older rib fractures.

7 7 Q Now, you've referred to the rib fractures, the
8 fracture of the left leg and the fracture to the shaft of the
9 right leg as being older fractures can you give us some time
10 line regarding that? What do we mean?

11 A Well, we don't normally see new bone forming
12 radiographically until beyond two weeks and on these
13 fractures that I described as being older these all have new
14 bone laid down around them so at least two weeks old and
15 we're probably talking month, two months frame.

8 16 Q So to a reasonable degree of medical certainty,
17 Dr. Dallaire, in examining the x-rays of Rebecca Moore how
18 many fractures did you find occurred to this child during the
19 first seven and a half months of her life?

20 A Well, those that showed on x-rays were two rib
21 fractures, the new fracture of the right ankle, the older
22 fracture of the right lower leg and older fracture of the
23 left leg so I guess that's five.

9 24 Q And hypothetically, Dr. Dallaire, if we discount
25 any kind of trauma like car accidents something of that

A-50

1 nature and discount any type of disease of the bones of a
2 person, an 8 month old child that has these kind of fractures
3 and based upon that information do you have an opinion to a
4 reasonable degree of medical certainty what the cause of
5 these various fractures to this child would be?

6 MR. FINK: Objection hypothetical question
7 asserts facts not of record.

8 THE COURT: Counsel you want to state the
9 basis for your question.

10 MR. LEBER: I think I'll just withdraw the
11 question at this time, Your Honor.

12 MR. LEBER: Nothing else.

13 THE COURT: Defense may cross.
14

15 CROSS-EXAMINATION BY MR. FINK:

0 16 Q Doctor, good morning to you?

17 A Good morning.

1 18 Q You have testified concerning your knowledge of
19 bones and you have rendered certain statements concerning
20 bones of children as opposed to bones of older--I guess you
21 have testified it is my understanding that bones of younger
22 people are more flexible; is that true?

23 A Yes, they tend to be more flexible.

2 24 Q Is there a time in a child's life or a person's
25 life when the growth of bones cease?

A-51

1 A Yes.

2 Q And is there a general age of that person when
3 growth ceases?

4 A Well, individual bones grow at different rates but
5 basically teen years.

6 Q Okay. From zero age or the date of birth up to the
7 teen years when bones are still growing are they also
8 forming? Is there additional formation? Are they already
9 formed at birth?

10 A They are already formed, basis of them, yes, is
11 already formed.

12 Q Is there a difference in composition of the bone
13 as the child grows from birth to teen-age?

14 A I assume so, yes.

15 Q Does it depend on the individual, what the
16 individual consumes in terms of vitamins and minerals as to
17 the contents of the bones?

18 A Yes, to a certain extent, yeah.

19 Q Are there certain individuals--are there certain
20 babies, for instance children of up to 8 months of age who
21 have bones that are more pliable than others of the same age?

22 A They can be.

23 Q They can be. Are you able--were you able to tell
24 merely by x-rays as to the how pliable this child, this
25 particular child's bones were?

A-52

1 A Looking at the x-rays, in all of the x-rays in
2 general this patient's bones appeared normal, aside from
3 those bones that were fractured.

9 4 Q Okay. Now, I guess I'm going to ask you to look at
5 all of the Commonwealth exhibits and we're going to start out
6 with the--I have here 1, 2 and 3. Was your testimony only as
7 to 4 and 5 or did it include 1, 2 and 3? I wasn't clear on
8 that, doctor.

9 A I read all the x-rays.

0 10 Q Okay.

1 11 Q I'm going to give you access to all of the x-rays
12 while giving your testimony. Again what x-rays show the
13 newest fracture, the newest fracture?

14 A The x-rays of the right lower leg.

2 15 Q You need the numbers, exhibits?

16 A Okay.

3 17 Q Exhibit numbers?

18 A Exhibits 2 and 1.

4 19 Q 1 and 2?

20 A Yes.

5 21 Q What does your trained eye? See I wonder if you
22 could explain that to the jury when you look at Exhibits 1
23 and 2 and you see a fracture can you describe what you see?

24 A It's an alteration in what norm, what one normally
25 sees as that particular bone.

A-53

Q An alteration?

A An alteration it can.

Q What does that mean? I'm sorry we can't blow it up for the jury to see. Can you further describe it as in addition to calling it an alteration?

A It could be a change in the contour of the bone, it can be a line through the bone, it can be actual separate piece of the bone, any of those things.

Q Okay. Would your training, doctor, include an ability to render an opinion as to how that bone was broken? Please think of the question. It's a yes or no answer. Would your training cover an ability or give you an ability to render an opinion as to how that bone was broken?

A You're looking for yes or no answer?

Q Sure, yes, I am.

A Yes.

Q Okay. Were you able to by looking at Exhibits 1 and 2 to render an opinion as to how the bone, the break that you saw occurred?

A Would you repeat please.

Q Sure it was not well phrased. I'll try again. By looking at Commonwealth Exhibits 1 and 2, which are the x-rays of the newest fracture, which you've testified to are you able to discern or tell the jury how that break occurred?

A The type of fracture the newest fracture?

A-54

Q The question is a yes or no question?

THE COURT: Witness may also explain her answer.

A Yes.

Q Yes, you are. Okay. Will you tell us what your opinion is as to how that fracture occurred?

A The type of fracture it is is associated with a forceful pulling or twisting motion, twisting motion.

Q It is your opinion that that particular fracture occurred in that way?

A That is what is thought to be the etiology of those types of fracture.

Q Could it have occurred in another way?

A Could it have? In total realm of possibilities I suppose, but this is through reported etiology or cause for these fractures.

Q Okay. Now, let's talk a little bit more about your opinion of how it occurred. You say it occurred in a twisting manner; is that your testimony?

A Reportedly in the literature these fractures cause--

Q I'm interested in what your opinion is then if you want to go ahead how you arrived at your opinion, that's fine. I'm asking you have you told this jury it is your opinion that this break occurred in a twisting manner?

A-55

1 A It is my opinion that this injury most likely
2 occurred by forceful pulling or twisting.

8 3 Q Pulling, pulling or twisting those seem to be two
4 almost diametrically opposed forces. Pulling one thinks of--
5 well excuse me. Doctor, I ask you is it not not true that
6 pulling is a different force than twisting?

7 A I think one could be contained within the other.

9 8 Q Could be. They are two different types of forces
9 are they not? One is a pulling you say or a twisting, but
10 the question to you, doctor, is, is it not true that they are
11 two different types of forces, is it not true?

12 A I guess.

0 13 Q You're the one that used it, doctor. I did not
14 use the term you did. Maybe I could get at it what do you
15 mean by pulling? You used the term I'm asking.

16 A I'm telling you based on my experience and my
17 reading that these reported mechanisms--

18 A You used the term pulling, did you not?

19 A Yes, I did.

1 20 Q Would you tell the jury what you mean by pulling?

21 A I think pulling is self explanatory. I think if
22 you're pulling a limb you may also involve twisting.

2 23 Q Let's put twisting aside for one moment. You have
24 demonstrated by your hands here in the courtroom in front of
25 the jury what you mean by pulling. When you reach your hand

A-56

1 out in front of you and then draw it straight toward you that
2 is pulling; right?

3 A Hm-hmm.

3 4 Q Now tell the jury what you mean by twisting?

5 A Twisting would be a rotation.

4 6 Q You have demonstrated that to the jury by rotating
7 your hand either clockwise or counter clockwise. Do you now
8 acknowledge that pulling is a different force than twisting?

9 A Yes.

5 10 Q Okay. You are testifying that based upon your
11 observation of the x-ray the break you have observed therein
12 could have been occurring by a pull or a twist; is that true?

13 A That is true.

14 Q Are you able to testify as to the force required
15 to establish the break? Do you have an opinion as to that?

16 A No, I do not.

7 17 Q Is it not true, doctor, that the break which you
18 observed in Commonwealth Exhibits 1 and 2 could have easily
19 occurred by non criminal means as opposed to criminal means?
20 You certainly can't say can you?

21 A I cannot say the intent of whatever force was
22 used, which I would imagine would not be slight force.

8 23 Q Doctor, is it not true that the break which you
24 observed in Commonwealth Exhibits 1 and 2 about which you
25 testified could just have easily occurred by non criminal

A-57

1 means as opposed to criminal means?

2 A Yes, I cannot testify to the contents of the
3 force.

9 4 Q Now, let's go to Commonwealth Exhibits 3, 4 and 5?

5 A Okay.

0 6 Q Commonwealth Exhibit 3 shows what?

7 A These are the films of the opposite leg, the left
8 leg.

1 9 Q The left lower leg. Left lower leg fractures?

10 A Yes.

2 11 Q How many?

12 A There is, there are fractures around the ankle.

3 13 Q That question requires a number, an answer giving
14 a number. Can you give a number? We're talking about
15 Commonwealth Exhibit 3.

16 A There are probably two fractures here.

4 17 Q Your answer seems uncertain, doctor. Are you
18 uncertain as to the number of fractures shown?

19 A There is a fracture.

5 20 Q Excuse me?

21 A Yes, one of the bones is not very clear there is
22 at least one fracture there.

6 23 Q Your answer seemed uncertain. I guess you cannot
24 tell whether one, two or more; is that what you're saying?

25 A There is at least one, yes.

A-58

7 1 Q Let's talk about that one.

2 A Okay.

8 3 Q At least one that you see. Where is it? Wonder
4 if you can describe the location on the child?

5 A It is around the ankle.

9 6 Q Do you know what bone it is?

7 A Yes, tibia.

0 8 Q Tibia?

9 A Tibia.

1 10 Q Are you able to describe that fracture. How do
11 you know it's a fracture?

12 A There's a little separate piece of bone that's not
13 suppose to be there.

14 Q There's a separate piece of bone?

15 A Yes.

3 16 Q Could that separate piece of bone come at birth?

17 A No.

4 18 Q Could not have?

19 A No.

5 20 Q Could only have come from a break?

21 A Yes.

6 22 Q What type of break?

23 A This is called a corner fracture.

7 24 Q Called a corner fracture.

8 25 Q C O R N E R?

A-59

1 A Yes.

2 Q What does that mean?

3 A It's descriptive for a type of fracture at the end
4 of the bone that looks like a corner.

5 Q Okay. That's appropriate. Can you tell or do you
6 have an opinion as to how that occurred? I mean whether it's
7 a twist, a pull, karate chop?

8 A The fracture on the left side is similar to those
9 seen on the right side so, yes.

10 Q What?

11 A If I'm to postulate an etiology, it would be
12 similar to the right side.

13 Q I apologize to the court reporter and I apologize
14 to the witness. I don't mean to interrupt you. Sorry. Are
15 you saying that corner fracture in Commonwealth Exhibit 3
16 came in your opinion from either a pull or a twist?

17 A Yes.

18 Q Is it not true that it is equally possible that
19 this could have occurred from non criminal means as opposed
20 to criminal means?

21 A I cannot testify to the intent of the force.

22 Q So is it not true?

23 A Yes.

24 Q Let's take Commonwealth Exhibit 4 what is shown
25 there?

A-60

1 A This is an image of the pelvis and both lower
2 legs.

6 3 Q Is that different than is shown on 1, 2 or 3?

4 A Yes.

7 5 Q How many fractures are shown there?

6 A The fractures of both lower legs can be seen on
7 these.

8 8 Q Can you give me a number?

9 A Can I give you a number? I can tell you what
10 bones are fractured.

9 11 Q Not what bones the number of fractures. Forget
12 bones for the time being. I'm looking for a number?

13 A At least three.

14 Q Three fractures in Commonwealth Exhibit 4?

15 A Correct.

1 16 Q Okay. Now, describe to the jury where they are?

17 A These are the fractures that I already described.
18 They're fractures of both ankles, and about both lower legs.

2 19 Q Wait a minute. Are these different fractures?

20 A No, they are not these are the same fractures
21 included on this film.

3 22 Q So if you take 1, 2, 3 and 4, Commonwealth
23 Exhibits 1, 2, 3 and 4 I've heard about three fractures; is
24 that true?

25 A That is correct.

A-61

Q What is shown on Commonwealth Exhibit 5?

A This is one picture of the patient's rib cage.

Q Rib cage. Which side?

A Both sides.

Q Both sides. Doctor, can you tell us whether or not you observed any fractures on Commonwealth Exhibit 5?

A Yes, there are two.

Q Two fractures. Where are they please?

A There is a fracture of the right 6th rib and the on the side, yes, and the left 7th rib.

Q How many ribs do we have?

A Most people have 12 on each side.

Q Can you tell me the type of fracture on the right rib cage?

A They're both healing fractures.

Q That means that goes to the, I guess, the age of the fracture. Are you able to further describe the fractures?

A They look like not displaced fractures.

Q What?

A Not displaced.

Q Not displaced that means it is just a crack and bone remains in place?

A Right.

Q Do you have an opinion as to how that occurred,

A-62

1 the crack, the fracture on the right rib cage?

2 A These injuries are not specific. I don't think I
3 could tell you how these occurred. Direct force perhaps.

4 Q How about the left one?

5 A The same.

6 Q Same. And is it also the same with regard to the
7 etiology the source that you are--it is equally as likely
8 that occurred from non criminal means as opposed to criminal
9 means?

10 A Yes, I cannot testify to the intent.

11 Q Now, one further area is to the age. We got the,
12 we know about the newest fracture shown I think in
13 Commonwealth Exhibit 1?

14 A I think 1 and 2, yes.

15 Q In the first place can you render an opinion with
16 more precision than you did on direct examination as to the
17 age of the fractures, Numbers 2 and 3?

18 A No, all I can say that they are older, greater
19 than two weeks of age.

20 Q Tell the jury what you see when you look at
21 fractures two and three, you see a part of the healing
22 process?

23 A Yes, you see the new bone starting to form around
24 the fracture site.

25 Q Is it completely healed?

A-63

1 A No.

2 Q Are you able within your area of expertise to
3 render an opinion as to whether or not ordinarily it would be
4 a source of pain, pain?

5 A I would not comment on that.

6 Q That would be outside of your area of expertise?

7 A An acute fracture should cause pain, but healing
8 fractures I would think would not cause much pain.

9 Q You say fractures Numbers 2 and 3 were not fully
10 healed?

11 A That's correct.

12 Q Do you have an idea as to how much longer it would
13 be before it would be fully healed?

14 A Perhaps a month or two.

15 Q How long does it take for the healing process to
16 start after initial fracture right away?

17 A Should start right away.

18 Q Right away?

19 A Yeah, we don't see it on x-rays early.

20 Q And when you say the healing process is started
21 and new bone growth had commenced tell the jury what you saw
22 on the x-rays which led you to that conclusion?

23 A New bone growth is exhibited by--

24 Q How do you know it's new as opposed to old?

25 A The configuration of the bone, the way it looks.

A-64

8. 1

Q I assume that.

2

A It's not old.

9 3

Q Can you tell the jury--you can't make us

4

radiologists overnight I understand that, doctor, could you

5

tell us what it was that you saw that led you to that

6

conclusion?

7

A Configuration. What that means is the outline of

8

the bone. The outline of the bone is different. Basically

9

bone is white on x-ray and new bone is also white and you can

10

see white around the fracture line.

0 11

Q You can see?

12

A The white new bone.

1 13

Q Color?

14

A It will--

2 15

Q Not configuration but color is the difference?

16

A Also configuration.

3 17

Q Can you show me that in Commonwealth Exhibit 3 or

18

whatever Exhibit better yet?

19

A There's no way for me to project it.

4 20

Q Okay.

21

A But there's no way I can project it from what we

22

have here.

5 23

Q Any way telling how old the rib fractures were?

24

A They're greater than two weeks old.

6 25

Q Two weeks?

A-65

1 A The rib fractures are greater than two weeks old
2 means it occurred more than two weeks before this child
3 presented to be x-rayed.

4 MR. FINK: Doctor, thank you very much.

5 THE COURT: Ladies and gentlemen, before we
6 go into any redirect we're little over due for our morning
7 recess. Take a ten minute break at this time. During this
8 recess and all the others please do not discuss the case
9 among yourselves or with anyone else. Court will stand in
10 recess for ten minutes.

11 (Ten minute recess).

12 THE COURT: Welcome back, ladies and
13 gentlemen. Our game plan we'll go to noon or very shortly
14 thereafter, find a convenient breaking point, take one hour
15 for lunch then get you right back to work, take mid afternoon
16 break. Then as soon as I can we'll give you predicted
17 stopping time for tonight. Unfortunately I can't do that very
18 accurately. I hear the testimony at the same time you do. I
19 don't get much better of an idea how long things are going to
20 take than you have. We'll do our best to keep you fully
21 informed Commonwealth redirect.

22
23 REDIRECT EXAMINATION BY MR. LEBER:

7 24 Q Dr. Dallaire, Mr. Fink is asking about the
25 etiology or cause of a particular fracture and you talked

A-66

1 about pulling or twisting and you rendered an opinion to a
2 reasonable degree of medical certainty this was caused by a
3 pulling or a twisting. What do you rely upon in order to
4 render such an opinion in that? How do you reach that
5 conclusion?

6 A Through literature, radiological literature.

8 7 Q And Mr. Fink in his cross-examination of you asked
8 about each particular bone and whether you could render an
9 opinion relative to that particular fracture that occurred.
10 Given the fact that this is a child less than 8 months of
11 age, given the fact that this is a child less than 8 months
12 of age and given what your observations were of all these
13 x-rays and all the fractures that you have enumerated, does
14 that give you basis to render an opinion as to whether or not
15 to a reasonable degree of medical certainty this was caused
16 by a criminal act or by a--

17 MR. FINK: Objection leading, extremely
18 leading.

19 MR. LEBER: I don't think so.

20 THE COURT: Let's get the question down.

21 MR. LEBER: I'm done with the question.

22 THE COURT: Witness may answer.

23 A Would you repeat it.

9 24 Q Considering all that you observed, all the x-rays
25 you observed and fractures which you've identified, putting

A-67

1 them all together does that allow you to render an opinion to
2 a reasonable degree of medical certainty as to whether this
3 was caused by accident or by criminal means?

4 MR. FINK: Objection, leading plus he's
5 cross-examining his own witness.

6 THE COURT: Overruled. As I understand the
7 question relates to considering all of the x-rays, all the
8 testimony thus far?

9 MR. LEBER: Right.

10 A Considering all the x-rays, the fractures, the
11 types of fracture, the number of fractures it is my opinion
12 that this picture is highly consistent with child abuse.

13 MR. LEBER: Thank you, nothing else.

14 MR. FINK: I must object to that. It's
15 clearly leading, it's clearly cross-examining his own
16 witness.

17 THE COURT: I ruled on it, ruling stands.

18 MR. FINK: I know you have.

19

20 RE CROSS EXAMINATION BY MR. FINK:

21 Q I guess you testified on cross-examination, did
22 you not, doctor, that you were unable to tell whether or not
23 this was done by criminal means or non criminal means; didn't
24 you say that?

25 A Yes, I did.

A-68

1 Q Now, we have the break, the district attorney asks
2 you a question now you've changed your mind?

3 A No, I have not changed my mind.

2 Q Your answer remains the same?

5 A Yes, it does.

3 Q Your answer is that you cannot tell whether--
7 your testimony is that it is equally likely that the breaks
8 occurred from non criminal as opposed to criminal means?

9 MR. LEBER: Objection, Your Honor.

10 THE COURT: Gentlemen, let's get one voice at
11 a time here.

12 MR. LEBER: My objection, Your Honor, it
13 misstates the testimony.

14 THE COURT: That objection is sustained that
15 misstates the witnesses answer on redirect. Counsel may
16 recross.

17
18 MR. FINK:

4 Q Let's start over again, doctor, when I questioned
20 you, it was my understanding that when I questioned you it
21 was my understanding that you testified that you, that it was
22 equally as likely that the fracture shown in Commonwealth
23 Exhibits 1 and 2 came from non criminal as opposed to
24 criminal means, you did say that, did you not?

25 A I said that I could not testify to the intent of

A-69

1 the force used.

2 Q Doctor, you're saying now you're talking about
3 force. I'm talking about source not force, source not
4 force. Did you not testify when I cross-examined you that it
5 was equally as likely that the break shown in x-rays Numbers
6 1 and 2 came from criminal as opposed to non criminal means?

7 A I don't think, I don't think that's exactly what I
8 said.

9 Q What did you say?

10 A I said that I could not tell under what
11 circumstances these fractures occurred whether it was a
12 criminal act or an accident or anything else like that I
13 could not state that. However--may I continue? May I just
14 add?

15 Q Oh, doctor, say anything you want to say.

16 A Based on the radiological literature and based on
17 looking at these x-rays alone--I only look at x-rays. I did
18 not see the patient or anything else--these fractures, the
19 type of fractures and number of fractures are very suspicious
20 for child abuse. Now, I may not be positive what your
21 definition of criminal is. I think perhaps I'm stuck in the
22 lingo.

23 Q We'll go into that in detail so there will be no
24 question left in your mind. You are testifying that the fresh
25 break, the most recent break demonstrated on Commonwealth

A-70

1 Exhibits 1 and 2 you could not tell whether it came from a
2 criminal or non criminal means, whether it was accident,
3 mistake how it occurred; is that true? Isn't that what you
4 said?

5 A Could not tell what specifically the intent was.

9 6 Q Right so?

7 A But the pattern of and nature of the fractures in
8 radiology is consistent with child abuse.

0 9 Q I'm sorry what did you just say?

10 A The types of fractures that are present
11 particularly about the ankle, the number of fractures in
12 different stages of healing are consistent with the
13 radiographic pattern one sees in child abuse.

14 Q Doctor, are they as equally consistent with
15 sources other than child abuse?

16 A Taken as individual fractures I suppose an outside
17 possibility would be one, but the whole picture we have, I
18 look at the whole picture.

2 19 Q The question is are they equally as consistent
20 with sources that are not child abuse?

21 A Not taken as a whole picture, no.

3 22 Q Let's go into that. Now, you mentioned some kind
23 of literature in your testimony as a source of your
24 conclusion?

25 A Yes.

A-71

Q What literature is it? What did you read?

A Specifically pediatric texts, radiological texts.

Q Can you refer to any specific pediatric text which you read to lead you to this conclusion?

A Yes, I have one in my car. I'm not sure of whole name it's Auld Anatomy.

Q Is your car here?

A Not well, yes, it's parked outside, yes. I also have texts in my office.

Q Okay now, the number of fractures and the age of the fractures and the place of the fractures is that what you're saying all of that leads you?

A Yes.

Q Yes?

A Yes.

Q Let's talk about child abuse. What do you mean child abuse? What does that mean to you?

A Physical harming of a child.

Q I'm sorry?

A Physical harming of a child.

Q Physical harm to the child, nothing more, nothing less?

A I think that's a difficult question to answer.

Q Are you able to tell the jury what you mean when you say child abuse? That requires a yes or no. Yes, Mr.

A-72

1 Fink, I am or no, sir, I'm not able to. Describe to the jury
2 what you mean by child abuse.

3 A Yes.

4 Q Yes, you are. Tell the jury what you mean by
5 child abuse?

6 A I'll expand on what I said before. Physical
7 harming of a child could be mental harming of a child.

8 Q Is that it? Mental harm to the child?

9 A I would imagine abuse can be physical or mental.

10 Q Physical or mental. Anything else? Any other
11 thing you want to say about your definition of child abuse?

12 A I'd like to keep it that way.

13 Q So that according to your definition of child
14 abuse child abuse can come either by intentional or
15 unintentional means?

16 A Yes.

17 MR. LEBER: Objection. Strike the objection.

18 THE COURT: Objection has been withdrawn
19 counsel may proceed.

20 Q Intentional or unintentional means child abuse
21 according to your definition can come from an accident; can
22 it not?

23 A Yes, it would all depend on what your definition
24 of accident is.

25 Q What's your definition? Tell the jury what your

A-73

1 definition of accident is?

2 A Something that is not intended is.

9 3 Q So to sum up I guess you have said both on direct
4 and cross-examination that you saw on Commonwealth Exhibits 1
5 and 5 five total fractures the most recent of which was I
6 think the left leg, the second and third were on the right
7 ankle and the fourth and fifth were two ribs, one on the
8 right and one on the left rib cage?

9 A The most recent was the right side.

0 10 Q Okay. Individually you could not tell from what
11 source they came and it could have come from most any source
12 as long as it was either it came from a pulling or twisting
13 motion except the ribs you couldn't tell there at all; is
14 that true?

15 A That's true.

1 16 Q You've also said that it is more likely than not
17 that it came from child abuse, which you have defined as
18 injury to a child mental or physical coming from an
19 intentional or unintentional act. Have I summarized that
20 correctly?

21 A Yes.

22 MR. FINK: Thank you very much. Your Honor,
23 I'm done.

24 THE COURT: If there's nothing further
25 witness may step down.

A-74

1 MR. LEBER: Thank you.

2 MR. LEBER: Dr. Supinski please.

3
4 R O B E R T S U P I N S K I, having been duly sworn, was
5 examined and testified as follows:

6
7 DIRECT EXAMINATION BY MR. LEBER:

8 Q Tell us your name and address please?

9 A Dr. Robert Supinski. Route 6, Cole Medical
10 Center, Coudersport, Pennsylvania.

11 Q What is your occupation?

12 A I'm orthopedic surgeon.

13 Q How long have you been engaged in that profession?

14 A I've been in the practice of orthopedic surgery in
15 Coudersport since 1985.

16 Q Can you tell the jury what your training is for
17 your position as an orthopedic surgeon?

18 A Yes, I obtained a Bachelors of Science at the
19 University of Pittsburgh in 1976. I then entered the
20 University of Pittsburgh Medical School and I finished
21 medical school in 1980. I entered the university hospital,
22 Pennsylvania State University at Hershey in 1985 and
23 completed an internship in surgery. Then entered the
24 orthopedic program, completed a four year residency in
25 orthopedic surgery which ended in 1985. I became licensed to

A-75

1 practice in the State of Pennsylvania in 1981. I have
2 achieved board certification in orthopedic surgery.
3 Following my graduation with the University Hospital at
4 Hershey I've recertified in orthopedic surgery and hand
5 surgery. I became a fellow of the American College of
6 Surgeons and I'm board certified as I said in orthopedic
7 surgery, and I'm member of the board of the American Academy
8 of Orthopedic Surgery, currently Orthopedic Society Board of
9 Directors, member of the Potter County Medical Society, A M A
10 and Pennsylvania Medical Society.

6 11 Q Can you tell us what in your training pertains to
12 orthopedics relative to children and injuries to children?

13 A Well, the word orthopedics takes it's derivation
14 from straight child. So orthopedics has always been
15 concerned with children, the correction of the forming of the
16 children and even to this day a major part of our training is
17 required in straight orthopedic pediatrics. So during the
18 course of the curriculum for orthopedics the board of
19 orthopedic surgery requires that you have no less than nine
20 months of dedicated orthopedics. Throughout remainder of your
21 training there is orthopedics which is mixed with adult
22 training. So we have a very indepth amount of orthopedics
23 dealing with child problems of any number of varieties.

7 24 Q Define orthopedics for the jury if you would,
25 please.

A-76

1 A Orthopedic surgery as it's practiced today in this
2 country has to do with the treatment of bone and joint
3 deformities, tendon and connected tissue deformities and
4 problems as well as nerve problems. Anything that has to do
5 with musculoskeletal system, the parts that make us work,
6 walk everything from arthritis to trauma, and trauma is a
7 major portion of orthopedics along with metabolic bone
8 diseases and other types of arthritic conditions effecting
9 the part of our body that allows us to move about.

8 Q In the course of your studies and your training
10 tell us about what training you have relative to radiology?

11 A Well, radiology is something that everybody learns
12 some of during the course of general medical training during
13 medical school, but specifically in orthopedics we spend a
14 major part of time looking at x-rays that have to do with
15 musculoskeletal system and that is a major portion of our
16 training. In fact there have been several studies recently
17 which have shown that interpretations of x-rays from
18 orthopedists to radiologists essentially are equivalent for
19 the musculoskeletal system for looking at routine x-rays, and
20 it's in fact the course of our practice we routinely will
21 treat fractures and treat problems before the x-rays are even
22 seen by the radiologist because that's part of the practice.
23 In fact, it's something that we do day in and day out and we
24 actually will x-ray fracture or injury before, and when I say
25

A-77

1 fracture, fracture is broken bone, cracked bone. It is all
2 essentially same thing different words for same problem.
3 We'll take a broken bone or fracture and we will x-ray it
4 when it first occurs and follow that periodically to make
5 sure there isn't any deformity to the bone and assess the
6 healing of the bone, and we'll follow this until the bone is
7 completely healed.

8 Q During the course of your training have you had
9 training relative to the detection and treatment of
10 individuals who have suffered from child abuse?

11 A Yes.

12 Q And tell us what that training has been?

13 A Well, in addition to the normal training in child
14 abuse that you get during medical school and during pediatric
15 rotations there is specific training that is given to you
16 because during your residency because you're obviously
17 treating the child, children who receive the blunt of this,
18 and most recently I completed a study course on child abuse
19 that was required by the New York State licensure. I'm
20 licensed in the State of New York. They require that. So
21 it's ongoing thing. We are constantly training and training
22 doesn't really end. We, for example, as I stated I'm board
23 certified and every so many years we will recertify, and in
24 fact we in addition to that year we're required to have a
25 certain amount of continuing medical education and in the

A-78

1 course of that all child abuse and training for that as well
2 as other orthopedic problems is normally, it's a routine
3 thing and it's something that we hear about on ongoing
4 basis. It isn't one specific time.

1 5 Q Since your completion of your internship at
6 Hershey Medical Center have you continually engaged in the
7 practice of orthopedic medicine?

8 A Well, if I may correct you, my orthopedic
9 residency my internship per say there isn't internship my
10 first year was in surgery my last four years concerned
11 orthopedic surgery that residency and that, yes, since I left
12 that I've continually engaged in orthopedic surgery.

13 MR. LEBER: Your Honor, I'm going to offer
14 Dr. Supinski as an expert in the area of orthopedics
15 particularly pediatric orthopedics and on issue of child
16 abuse.

17 THE COURT: Counsel may cross as to
18 qualifications.

19 MR. FINK:

2 20 Q Doctor, good morning to you.

21 A Good morning.

3 22 Q You have been offered as an expert particularly in
23 the field of pediatrics I understand?

24 A If I understand the question, correctly it was in
25 the field of orthopedic surgery and pediatric orthopedics,

A-79

1 and whereas there are some people who practice nothing but
2 pediatric orthopedics. I do not practice that exclusively.
3 I do practice orthopedics. Part of that in large portion
4 deals with pediatric orthopedics.

4 Q Large portion. Well, doctor, let's--why don't you
6 give the jury a percent of your orthopedic surgical patients
7 that are over 12 years of age, under 12 years of age. Under
8 12 years of age if you can you do that?

9 A Yes, I can.

5 Q Do it please.

11 A That's approximately 20 percent of my patients.

6 Q I'm sorry?

13 A 20 percent.

14 Q 20 percent?

15 A Yes.

8 Q Are under 12 years of age?

17 A Yes.

9 Q Doctor, you testified, I believe, about training
19 in in reference to child abuse, did you not?

20 A Yes.

0 Q What was your training did I understand?

22 A I have stated that my training was continuing from
23 the time I entered medical school through my orthopedic
24 residency training and subsequently I've taken additional
25 continuing medical education courses on the subject.

A-80

1 Q Let's talk about medical school first. What
2 courses did you take in medical school; that was in 1980?

3 A In medical school it was between 1976 and 1980 and
4 yes, in 1978 I had to do a pediatric rotation and at that
5 time I had training in child abuse but subsequently--

6 Q You had courses in medical school?

7 A No, as part of medical school.

8 Q Medical school, no?

9 MR. LEBER: My objection is to Mr. Fink not
10 allowing the witness to complete his answer I just
11 appreciate--

12 THE COURT: Witness may explain his answer.

13 Q Certainly. I apologize.

14 A There is no such thing as courses in medical
15 school in child abuse.

16 Q Okay.

17 A There are rotations in different subjects. Just
18 as there are no courses in gall bladder disease or total knee
19 replacements. What there are is a--what there is is a period
20 of training and period of pediatrics on rotation during the
21 time you do pediatrics and lectures before that. This is a
22 normal part of training. This is a recognized part of any
23 physician's training training in this state. As a matter of
24 fact, it's required that we be trained in that. It's a state
25 statute as I understand.

A-81

Q Doctor, excuse me, are you or are you not saying that in medical school you had training in child abuse?

A Yes, I have.

Q Yes, you did. That is not demonstrated by any particular course; is that true?

A That is correct. There is no course entitled child abuse 101.

Q What courses did you--how were you submitted to the field of child abuse in medical school?

A As part of our normal training, which includes course in pediatrics, it also includes a course in psychology. During those times we were exposed to child abuse, that was only one small portion of my training.

Q Now, during your residency you had part of your residency dedicated to pediatrics did I understand?

A Yes.

Q Where did you take your residency?

A At the Milton Hershey Medical Center of the Pennsylvania State University.

Q How long was your residency?

A The residency for orthopedic surgery requires you have to a five year period of time, which includes your first year of surgery and subsequent four years of orthopedics.

Q Is the answer five years?

A Five years.

A-82

3 1 Q Thank you very much. And of those five years how
2 much was dedicated to pediatrics?

3 A Of the five years it's required to be no less than
4 nine months specifically.

4 5 Q Is the answer to my question nine months?

6 A No, it is not no less than nine months that is
7 dedicated. In fact there is more than nine months because
8 during the remainder of the time you are dealing with a
9 variety of problems, which would include children's
10 orthopedics.

5 11 Q What's the short end answer?

12 A There is no short answers.

6 13 Q You can't tell me what period of time was
14 dedicated?

15 A It was more than nine months.

7 16 Q Ten years is more than nine months?

17 A Well, I have been constantly training since then
18 so one might say you've studied child abuse as part of your
19 training for the past ten years.

8 20 Q You have told the jury that you are well trained
21 in the field of child abuse, have you not?

22 A Yes.

9 23 Q What is your definition of child abuse, doctor?

24 A My definition of child abuse is anything that is
25 either done actively or passively that does not insure the

A-83

1 health and well being of the child. Children have the right
2 to be raised without harm. They have a right to be protected.
3 At one point in time in this country children were not
4 recognized as having rights, and in fact the first child
5 protection laws came about because they had to be sheltered
6 by the humane society, and my definition is that a child
7 should not be subjected to anything that might harm his
8 ability to grow and have a safe environment. So that would
9 include both mental and physical, sexual harm, anything that
10 would harm that child.

11 Q Intentional or unintentional?

12 A Unintentional abuse occurs. The child has a right
13 to protection, that child cannot protect itself. A child who
14 is not ambulating, child who is in a crib deserves to be
15 protected. Neglect is as much abuse as active abuse.

16 Q I'm sorry.

17 A Neglect.

18 Q Neglect?

19 A And failure of protection is as much abuse as
20 actual active abuse, both of those are equivalents.

21 MR. LEBER: Can we approach briefly?

22 (Following discussion held at the Bench).

23 MR. LEBER: Judge, I'd like to impose a
24 general objection to defense counsel's demeanor. I think that
25 Mr. Fink is acting disgusted by his hand motions. He's

A-84

1 attempting to cut the witness off from completing his
2 answers. I think that he generally is expressing a demeanor
3 which is intended to minimize or belittle the expertise of
4 this witness. I think he did the same thing with the last
5 witness.

6 MR. FINK: He's doing that himself.

7 THE COURT: Now wait a minute, we're not
8 getting into a debate, that's not going to happen, that's not
9 going to happen in this case. Alright. I'm not going to enter
10 a specific ruling. I want to make sure that this witness is
11 accorded the same courtesy and respect we try to give all
12 witnesses in the court. He should have a chance to explain
13 his answers fully in accordance with law. Let's proceed.

14 THE COURT: On qualifications you may
15 continue.

16 MR. FINK: Your Honor, I have no further
17 cross-examination on qualifications.

18 THE COURT: In the absence of any objection
19 we will receive the witness as offered as an expert in
20 orthopedic surgery, orthopedics, pediatric orthopedics and
21 child abuse.

22
23 MR. LEBER:

3 24 Q Dr. Supinski, you were employed at Charles Cole
25 Memorial Hospital or engaged in your practice at Charles Cole

A-85

1 Memorial Hospital in September of 1996; is that correct?

2 A No, I began practicing in July of 1985 and I have
3 been self employed.

4 Q But--

5 A But in September of 1996 I was practicing there.

6 Q Okay. And on September 24, 1996 did a pediatric
7 case come to your attention?

8 A Yes, I was asked to go to the Emergency Room to
9 see a child.

10 Q And that child was whom?

11 A It was the child in question here, Miss Moore.

12 Q And did you see the child at that time?

13 A Yes, I did.

14 Q Based upon what you observed did you have an
15 estimate as to the age of that child?

16 A This was a child who was six or seven months of
17 age. She appeared her stated age, which was the history given
18 to the nursing staff in the Emergency Room by the
19 accompanying adults.

20 Q Who were the accompanying adults to best of your
21 recollection?

22 A At that point in time I was under the impression
23 it was the mother and the father.

24 Q Are either of those individuals, the person you
25 thought was the father or mother are they present in the

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1 courtroom today?

2 A Yes.

1 3 Q Who is in the courtroom today?

4 A The father, who I thought was the father is that
5 gentleman, is present.

2 6 Q You're indicating the gentlemen seated next to Mr.
7 Fink?

8 A Yes.

9 MR. LEBER: Your Honor, if the record would
10 note he's identified the defendant.

11 MR. FINK: We'll acknowledge he's identified
12 my client.

13 THE COURT: Noted in the record.

14 Q At that point did you have an opportunity to
15 discuss this case with Mr. Bailey and with the other, with
16 the female that was with him?

17 A Yes.

18 MR. FINK: I'm going to object to the term
19 discuss this case being so general as to--

20 THE COURT: Alright I'll ask counsel be more
21 specific.

4 22 Q Did you discuss with the two individuals who were
23 there, Mr. Bailey and the woman who you identified as the
24 mother the injuries to Rebecca Moore, the daughter?

25 A Yes, I discussed the injuries to this child.

A-87

5 1 Q Can you tell us what, if anything, you recollect
2 that Mr. Bailey, the defendant in this case, told you about
3 what had occurred and what happened to this child causing
4 these injuries?

5 MR. FINK: Your Honor, please may I approach
6 the bench I'm going to interpose an issue of corpus delicti
7 at this point.

8 THE COURT: Gentlemen, you may approach. I
9 it's not my intention to decide this case at side bar.

10 (Following discussion held at the Bench).

11 MR. FINK: I do not know whether there is any
12 inculpatory statements coming from the lips of the witness as
13 it relates to my client. In case he intends to do so I
14 respectfully suggest that no evidence as to confession or
15 admission as to the charges can properly be admitted because
16 there's been no testimony up to this point that it is more
17 likely than not that a crime has been committed and that
18 the victim was the victim of that crime. The corpus delicti--

19 THE COURT: Alright I think I understand the
20 issue. I have no idea where you're headed here.

21 MR. LEBER: As far as--there's certainly no
22 inculpatory statement that was made.

23 MR. FINK: Thank you.

6 24 Q Dr. Supinski, to rephrase the question what did
25 Mr. Bailey tell you in terms of what had happened to this

A-88

1 child?

2 A What I remember was that he was very upset of the
3 fact that child had been injured, in fact was tearful, stated
4 he didn't know how anything like this could have happened. In
5 fact I think his words were, "How could something like this
6 have happened? "

7 Q In the course of your dealing with the case of
8 Rebecca Moore what did you rely upon to make a diagnosis in
9 this case, if you did make a diagnosis?

10 MR. FINK: Your Honor, I'm going to object in
11 what case? A diagnosis of what?

12 MR. LEBER: I do believe I said the case of
13 Rebecca Moore.

14 THE COURT: That was my understanding. I
15 don't think there's been any testimony as to diagnosis as of
16 yet. The question was was there a diagnosis. Commonwealth
17 may proceed.

18 A My diagnosis was this child had acute fracture of
19 her ankle and multiple other fractures which were of varying
20 ages and varying stages of healing.

8 21 Q How did you reach the conclusion relative to these
22 various fractures?

23 A At the time I was asked to go to the Emergency
24 Room there had already been x-rays taken and I was able to
25 look at those x-rays, observe those x-rays, and based upon

A-89

1 the x-rays as well as examination of the child.

2 Q Doctor Supinski, I believe you had in front of
3 you, unless they've gone someplace else, five exhibits which
4 are x-ray film can you identify them please?

5 A Yes, Exhibit 1 which is an x-ray of the right
6 lower leg that includes both anterior view, it's two-view
7 x-ray of the right lower extremity, which includes anterior
8 posterior view from the front and a view from the side. And
9 this shows the more acute injury, the one that brought her to
10 the hospital for x-rays, and that includes a fracture of the
11 ankle including both bones the tibia and the fibula and that
12 is described was described by many as Salter two fracture.
13 It's definition of type of fracture going through the growth
14 plate and into the bone and that is a descriptive term. It
15 also shows some evidence of the covering of the bone being
16 grazed on the tibia shaft a little bit indicating there may
17 have been an older injury as well noted in there. I don't
18 see any acute fracture there at this point in time, and in
19 fact the right lower extremity fracture would be consistent
20 with the swelling and discomfort the child had in that right
21 lower extremity. For the second x-ray, that's two more views
22 of the same, of the same lower extremity on the right it's
23 slightly different angles but it shows same thing. The third
24 x-ray is a two view x-ray of the--on this one I don't see the
25 marker that tells me it's right or left but that may be a

A-90

1 function of the view here but this shows--

2 MR. FINK: I can't hear the witness.

3 A On this view of number, the third I cannot tell
4 whether this is marked right or left it maybe a function of
5 the fact that lighting is poor in here. This is additional
6 x-ray and I believe this is left leg. There is identifying
7 mark on here so I'll refer to the fourth exhibit where both
8 legs are on it, and in fact this does show additional
9 periosteal bone formation on the left leg further up. And
10 there are--looking at this it shows a fracture of the ankle
11 on this x-ray, which I believe is the left, that is in a more
12 advanced form of healing rather than the right which is acute
13 fracture. And there is also another finding on this x-ray
14 which shows that there is remodeling of a fracture of the
15 tibial shaft, that indicates not only has the bone healed but
16 now attempts to go straighten itself after healing in a
17 crooked position, that indicates a much later form of
18 healing.

19 And finally, there are fractures in the ribs laterally
20 on the right and left, and these fractures appear to be even
21 much earlier fracture because these have already lost any
22 parosteal bone formation and show it is in an advanced form
23 of healing. So this one appears--the rib x-rays appear to
24 have been the earliest injury. The fracture to the tibia
25 shaft appears to be a later injury and the angulated fracture

A-91

1 on the right which is remodeling appears that in fact that
2 was older, and finally there were ankle fractures and those
3 ankle fractures as well as what was described earlier as
4 these corner fractures. What that means it's the corner of
5 the bone, it's metaphysis. Like this right at the corner.
6 So originally when people name things they frequently named
7 it in plain language so it's nothing mysterious. It's where
8 parosteal comes down over the growth plates, that's in fact
9 distributed. You see an injury right at the bone that speaks
10 to the way in which the injury occurs.

11 Q You've used several terms. When you refer to
12 acute fracture what does that mean?

13 A When you have an acute broken bone or fracture is
14 the same thing, you will see that it's like you've broken a
15 piece of stick in two pieces. You break it and there are two
16 fresh pieces of stick. It looks there's two pieces of stick
17 there. As the body heals the first thing that happens in
18 healing doesn't--you can't say healing started today or
19 healing starts in two weeks. When you have an injury, the
20 first thing that happens is you get pain, swelling and
21 bleeding because the bone has blood and that blood comes out
22 and it forms a blood clot. So earliest form of healing is
23 exactly what you see when you cut yourself you get a blood
24 clot. In that blood clot you get fiber material that forms
25 around broken bones and eventually the body says, ah ha, it's

A-92

1 broken, we're going to start fixing this. So next thing that
2 happens body starts to go in and chew away the end of the
3 bone. If you were going to glue something, you would glue the
4 broken part. The body does that, starts nickeling away,
5 we're broken up, let's starts putting glue in that, you get
6 something called a soft callus. You don't start to see that
7 somewhere around three or four weeks. Usually two to three
8 weeks you don't see new bone in child of this age. So by two
9 weeks you start to see little bit of bone, not really bone
10 but calcification of the soft callus, that's what you really
11 see two to three week period on these bones. So we can say
12 that some of these x-rays show that injury occurred
13 immediately prior because there's no formation of new bone.
14 There's no sign of healing. So you can say that that
15 happened somewhere prior to two weeks and normally more than
16 likely after examining the patient it happened in the prior
17 two or three days. Probably immediately but it was a very
18 short period of time and then you start to see this
19 calcification of the callus and the periosteal, which is the
20 covering of the bone, starting to cover more bone. After it
21 heals further, you get--that becomes a solid piece, you no
22 longer see just the calcification and parosteal. Its solid
23 piece body starts to smooth it back down and reshape it so
24 that it looks like the bone, it's continuation of healing in
25 fact eventually down the road these bones will go back to

A-93

1 being absolutely normal. In fact if we were to x-ray this
2 child today we may not see any signs of these injuries
3 assuming there haven't been new injuries.

1 4 Q You also used the term growth plate what's the
5 growth plate.

6 A Growth plate is what a child--when a child is born
7 it has a large amount of cartilage. Most of the skeleton
8 starts out as cartilage as calcium is placed in there it
9 forms something that has structure so body can grow. Long
10 bones grow in two directions. They grow, if you had a pencil
11 they grow along the edges and get wider, it also gets longer.
12 The way it can do that there are cells which allow it to grow
13 in width, that's parosteal and that's a very active structure
14 in a child that's why they heal so quickly to grow. On the
15 left what you have is a piece of bone, then you have some
16 cartilage at the end, then you have another piece of bone. In
17 fact that whole end was cartilage little earlier in life than
18 bone starts to form in there. The cartilage is hard bone
19 cartilage, which is the growth plate and then more hard bone.
20 In fact, that cartilage grows very rapidly and it also
21 applies behind it so when you stop growing that growth plate
22 closes and the reason you stop growing because the growth
23 plate finally stops growing faster, then the bone ossifies
24 and it's a soft area. Cartilage is like the covering on
25 chicken bone, the white stuff, it's very soft and pliable and

A-94

1 it's easy to break that. It's easier to break that than it
2 is the bone itself so it takes less force to do that.

2 3 Q Okay. And specifically where is this growth plate
4 located?

5 A Well, there are several growth plates in the
6 bone. There are growth plates both distally. Distally means
7 down by the ankle closer to the floor and leg that's distal
8 and there's more up at the knee. Long bones have growth
9 plates generally both ends. This child had the--one we're
10 talking about is down at the ankle.

3 11 Q Now let's go back to September 24, 1996 and your
12 observations at the emergency room. Tell us first of all
13 what you observed relative to this child Rebecca Moore?

14 A The child had pain and swelling in the right ankle
15 and there was, there were concerned parents or people who
16 appeared to be parents, certainly they were the ones who were
17 parenting the child at the time and other than that the child
18 looked relatively healthy. There were a few bruises. I
19 believe there's some bruises on the face and at this point in
20 time was, without going back to the Emergency Room records
21 looking at it, I cannot recall whether there were bruises on
22 the body as well. I don't believe there were bruises
23 anywhere but the face or side of the head and the ankle in
24 question.

4 25 Q You just described the ankle as being swollen.

A-95

1 Anything further you can tell us about what you observed of
2 the ankle at the time?

3 A Well, it was painful if touched.

5 4 Q What about it's color?

6 A Well broken bones tend or broken areas tend to
7 have redness and swelling. It appeared to be more acute than
8 the lightest bluish tinge you get from old injury or bruise.
9 It appeared something that occurred relatively recently. It
was swollen and red.

6 10 Q What causes that?

11 A That's after the bone breaks or area is injured
12 that's the bleeding that occurs. It is something that looks
13 almost like a bruise but it is in fact because the blood
14 comes out it's irritating and trauma to the surrounding soft
15 tissue..

7 16 Q Did you in fact observe these x-rays that are
17 before you on September 24th?

18 A Yes, I did.

8 19 Q Now, looking at Commonwealth Exhibits Number 1 and
20 2 tell us specifically with those items what you observed as
21 far as any abnormalities?

22 A Well, 1 and 2. I'm sorry show me that right lower
23 extremity. Specifically the two bones at the bottom, and
24 what I see is a new acute fracture down at the ankle
25 involving the two bones at the growth plates, what has been,

A-96

1 what could be called corner fracture or a little fracture
2 that you broke the leg on that piece of bone, Salter II
3 fracture is another word for that. I see periosteal reaction
4 up in the shaft. What it appears bone is remodeling. Shaft
5 itself has been broken some time previously, that time frame
6 would be somewhere in the three to four, three to six week
7 period, more likely around four weeks.

8 THE COURT: Since it appears we're getting
9 into some extended testimony we'll feed this jury. I think at
10 this time we'll take the noon recess until 1:15. During this
11 recess, ladies and gentlemen, do not discuss the case among
12 yourselves or with anyone else. Thank you. Court will stand
13 in recess until 1:15.

14 Noon recess.

15 THE COURT: I hope you all got fresh air and
16 sunshine. We'll put you back to work. We'll be going until
17 5:00 tonight. Dr. Supinski, remains under oath. Commonwealth
18 was on direct.

19
20 MR. LEBER:

21 Q Dr. Supinski, I believe you finished by discussing
22 the Exhibits 1 and 2. Let's examine Exhibit No. 3 ask if you
23 can tell us what your findings were relative to Exhibit 3?

24 A Exhibit 3 as I stated earlier, was what I believe
25 to be the left lower leg and appears there is an L here.

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1 These x-rays look distinctly different from the ones that are
2 clearly marked as the right, and in this light it does appear
3 that there is a healing fracture on the tibia, and there are
4 also marginal or quarter fractures down around the ankle
5 indicating there was at least one if not two fractures in
6 there of varying ages distinctly different from the left--
7 I'm sorry the right lower extremity, which was acute fracture
8 and distinctly which appears to be shaft what was remodeling.

0 9 Q Exhibits 4 and 5 would you examine them, please.

10 A Exhibit 4 is a frog lateral of the lower
11 extremities as part of a series of trauma type series looking
12 for other injuries, and this clearly shows the right tibia
13 with bow that's remodeling which appears of the angular shaft
14 fracture anterior, periosteal fracture on the left tibia and
15 shows a pelvis with no apparent fractures.

1 16 Q When you say a frog?

17 A That's position of the child's legs it's just way
18 of getting both legs on the same x-ray. It's of no, it's just
19 lying anterior A P or posterior or lateral x-ray. And Number
20 5 shows rib fractures of both the right and left chest and
21 this shows fractures which are later stage of healing where
22 there is not periosteal reaction, but the bone appears to be
23 in advanced healing where you can see there had been a
24 fracture of advanced healing.

2 25 Q Let's go back again to the Emergency Room where

A-98

1 you saw this patient. Is that where you saw Rebecca Moore
2 the first time?

3 A Yes, it was.

4 Q Describe what you did at that point as far as
5 treatment for Rebecca?

6 A At that point in time I placed the child in a
7 cast, and the type of fracture she had was one that I would
8 have expected to heal in simple casting such that she would
9 be able to relieve her pain and allow her to go onto heal,
10 and in fact she did go onto heal without any difficulty.

11 Q You discussed relieving her pain. Can you tell us
12 what your observations of this child were in the Emergency
13 Room on that date relative to any pain she may have had?

14 A This child really didn't complain of any pain
15 unless you were to touch her leg and move it. In fact she
16 was able to sleep most of the time. We attempted to treat
17 her with very gentle application so to let this heal. She
18 was not in excruciating pain as long as you did not touch
19 that extremity. Frequently when a child is injured they cry
20 and become exhausted. If you don't disturb them very much,
21 they'll continue to sleep as long as you don't move the
22 extremity very much. She wasn't under extreme duress or
23 anything of that type.

24 Q What would normally be the symptoms of a child of
25 that age would suffer for any of the other fractures?

A-99

1 A It would be expected that child would cry
2 significantly for several days.

6 3 Q Now, doctor, based upon the history you obtained
4 during the visit of the mother and Mr. Bailey to the
5 Emergency Room, based upon your examination of this child,
6 based upon the x-rays which you viewed and your experience
7 and training did you reach an opinion as to a reasonable
8 degree of medical certainty as to how these injuries
9 occurred?

10 A My opinion was that there were multiple fractures
11 of various stages of healing. Looking at the bio mechanics of
12 each type of injury frequently we'll try and figure out how
13 the injury occurred so we can then treat it appropriately.
14 And the fractures that were around the ankle or the quarter
15 fractures are frequently something that will happen because
16 the periosteum is strengthened near the growth plate, that is
17 something that happens with shaking or traction. The
18 fractures of the tibia appear, at least the tibia that was
19 remodeling, the one that was angled, appeared to be as a
20 result of direct trauma. The fractures of the ribs could be
21 caused by either direct blow or compression but compression
22 would tend to give you multiple fractures bilaterally so it
23 appeared these were direct blows more than likely. So each
24 of them are slightly different mechanism, but they are ones
25 which can be reproduced in the laboratory setting, and in

A-100

1 fact we do actually reproduce on animal models and variety of
2 different experimental models to try to better understand
3 these type of injuries whatever type of fracture there is.

7 4 Q So again did you have an opinion to a reasonable
5 degree of medical certainty as to causation of these?

6 A In a child who is not ambulatory, who has muscle
7 strength in the 6th to 7th month of age group where they are
8 physically unable to injure themselves in this manner it is
9 my opinion based upon a reasonable degree of medical
10 certainty this child was undergoing abuse and has had
11 multiple injuries inflicted upon it by some other person or
12 persons.

8 13 Q Now, are there diseases children may suffer which
14 result in frequent breaking of the bones?

15 A Yes, they are.

9 16 Q And what are those diseases?

17 A Well the one that is most commonly talked about is
18 osteogenesis imperfecta. That in those instances children
19 will have frequent fractures of bones and usually with small
20 amounts of trauma. They have other findings, familial
21 histories, the whites of their eyes are actually blue. In
22 fact these children will have painful fractures and they'll
23 have painful fractures that will be discovered at the time of
24 birth or shortly afterwards. Even though they break their
25 bones very easily it's very painful and they go onto heal

A-101

1 normally. This is kind of thing even if the child had this
2 diagnosis the child's needs had been neglected because the
3 child had never been treated for anything like this. These
4 were multiple injuries over time. In addition, this child did
5 not have the other significant metaphysis. Children tend to
6 have different appearance. They tend to be short for their
7 age. I in my medical school class we had students who
8 actually had osteogenesis imperfecta and had it and as a
9 result we all became familiar with that and it was that's one
10 of the better known diagnoses. This child did not have that.
11 There are several other types of vitamin deficiencies,
12 Vitamin D deficiencies and things of that nature. One of the
13 problems with that the growth plates would be abnormal.
14 These were normal growth plates. All the growth plates would
15 be abnormal. This child did not have that. The fractures
16 were not tended to be isolated. If they were osteogenesis
17 imperfecta they would have fractures in various places. Just
18 the trauma of birth would cause this child skull fractures,
19 clavicle fractures, that's why this child does not fit in
20 that category. Frequently children of that would die at
21 birth. In addition there are, there's a periostitis, and this
22 child did not have that because all the bones, long bones
23 weren't effected. In addition the ribs or other members are
24 of different structure than long bone so it is different type
25 of bone. This child does not have that diagnosis, that's one

A-102

1 one could expect because they were in fact none of the
2 findings were truly symmetrical.

0 3 Q Do you have an opinion to reasonable degree of
4 medical certainty the condition you observed in Rebecca Moore
5 on September 24, 1996 could be caused by anything other than
6 child abuse?

7 A Yes, it's my opinion that it could not been caused
8 by anything other than child abuse.

1 9 Q Thank you. Doctor, can you give us any evaluation
10 of what kind of force in terms of pound or whatever it might
11 be is required in order to cause a break or a fracture such
12 as occurred to the lower right leg of Rebecca Moore?

13 A It would not be a great force. It would be--each
14 of these areas are slightly different, the growth plates in
15 fact can be quantitated. That type of injury in that age
16 group would be more than likely it could be done by just
17 shaking the child. So we're talking very low force, under
18 ten pounds. Certainly fracture of the tibia shaft would be
19 something slightly greater. It could be in the realm of 10
20 to 20 pounds, but it would have to be direct blow, in fact
21 that's the ribs. For example, that could be done by a direct
22 blow, would not have to be excessive force, it would not have
23 to be hundred pounds. It could be as simple as somebody
24 shaking a kid, a child vigorously, which is why people are
25 told not to do that, but the growth plate could be shattered

A-103

1 by shaking or direct pulling of the foot at the growth plate
2 in the realm of ten kilograms, which would be under 20, 22
3 pounds.

4 MR. LEBER: Thank you. I have nothing else
5 of Dr. Supinski.

6 THE COURT: Very well. Counsel for defense
7 may cross.

8

9 CROSS-EXAMINATION BY MR. FINK:

2 10 Q Doctor, I'd first like to ask you a few questions
11 if I may about the examination of the child that you
12 conducted in the Emergency Room. Do you have the records of
13 that Emergency Room observation and treatment with you?

14 A No, I do not.

3 15 Q When were you summoned to the Emergency Room at,
16 what time approximately?

17 A I can't tell you that.

4 18 Q Who was there when you arrived there?

19 A The mother, the defendant, and the only other
20 person that I can recall in the actual Emergency Room was Dee
21 Carr, other than that I cannot recall. I also recall going
22 to the radiologist office to look at the x-rays and at that
23 time Dr. Wallisch was in attendance.

5 24 Q The x-rays had already been taken before you
25 arrived at the Emergency Room; is that true?

A-104

1 A That's true.

2 Q We're talking about the five, at least the five
3 x-rays which are currently in front of you; is that correct?

4 A That's correct.

5 Q Okay.

6 A Also Dr. Dallaire was there in the x-ray
7 department office.

8 Q Is that unusual for you to be called to the
9 Emergency Room in a situation such as this?

10 A No, it's not.

11 Q The observable injury was to the right ankle?

12 A The observable injury, I believe, it was to the
13 right ankle, I believe it was to the right ankle was the
14 acute injury, but I'd have to take a look at the x-rays.

15 Q You're looking at what exhibit?

16 A Well, at this point in time I'm going to look at
17 Exhibits 1 and 2 and there is acute fracture of the right
18 ankle. So yes, it would be the right ankle. Now the left
19 ankle, this would be Exhibit 3, also shows injuries but the
20 right ankle is the one that.

21 Q Now, what you observed outside of the x-rays on
22 the child was swelling, was there any discoloration?

23 A The--I believe there was some redness there at the
24 time, but that's not unusual.

25 Q Was the child conscious as you examined her?

A-105

1 A She slept some of the time and she was easily
2 aroused, but she was not, as I stated previously, she wasn't
3 crying loudly. I attempted to treat her without arousing her.

3 4 Q Doctor, when you examine such an injury you try to
5 obtain any history you can from anybody that's there; do you
6 not?

7 A Yes, I do.

4 8 Q And history is important in the diagnosis and
9 treatment of most any injury; is it not?

10 A It's definitely something that contributes to the
11 abilities to render care.

5 12 Q Did either the mother or my client give you any
13 history concerning why the child was brought in or concerning
14 the particular injury involved?

15 A No, there was no history which explained what had
16 happened. There had been a statement perhaps the sister had
17 fallen on the child, but no explanation for all of the
18 injuries.

6 19 Q For what?

20 A For all of the injuries.

7 21 Q I refer only to the injury that was observable?

22 A There was rendered an explanation that perhaps a
23 child had fallen, a sibling had fallen on this child.

8 24 Q Who gave you that explanation?

25 A At this point in time I can't recall that. I

A-106

1 believe--I cannot absolutely recall that. I believe it was
2 the mother, but I honestly couldn't say for sure.

9 3 Q Was that explanation consistent with the injury as
4 you saw it?

5 A No, it was not.

0 6 Q Okay. Now we're talking only about the ankle
7 injury that was observable by the swelling and I guess
8 possible discoloration?

9 A Yes.

1 10 Q Tell me why the explanation was inconsistent in
11 your opinion with what you observed?

12 A Well, the type of injury that you would obtain
13 from a child falling on the other child would be a direct
14 blow to the mid shaft of the tibia, for instance, and that
15 could have accounted for one of the fractures, one of the
16 older fractures certainly not at the ankle. If the child had
17 fallen and somehow had twisted the extremity you might have
18 had a spiral fracture, but that was not what was observed.
19 What was observed was a traction type injury to the growth
20 plate where one--where the growth plate had to be pulled
21 apart.

2 22 Q Now, you observed that from external examination
23 of the ankle itself or from the x-rays or both?

24 A From the x-rays more than the examination.

3 25 Q What x-rays did you observe particularly? 1, 2

A-107

1 and 3?

2 A 1 and 2 were consistent with this injury, which is
3 the ankle injury.

4 Q Now, there has been previous testimony describing
5 what the expert witness thought to be the type of force not
6 the extent or degree of force but the type of force. Do you
7 have an opinion as to the type of force that may have
8 accomplished the break which we've been discussing?

9 A That type of injury occurs with a traction type
10 injury or a side to side type injury.

5 11 Q Now let's try to define these terms for the jury.
12 Traction type, what do you mean when you use the word
13 traction?

14 A Something that stretches the periosteal around the
15 growth plate, in other words the covering around the growth
16 plate. The growth plate is weaker than the ligaments,
17 therefore, if you were to shake a child, the growth plate
18 would fail before the ligaments or before the bone that could
19 be what causes a corner type fracture. A direct blow to the
20 side can cause that as well. In a child of this age one would
21 not see this like with a child running or walking because a
22 child doesn't. So you would have to have either something
23 that pulled the growth plate or something that had an angular
24 force, direct blow across. It almost is like breaking a
25 stick with your thumbs there, that also would do that by

A-108

1 pulling at the other side.

2 Q How about something falling on the child?

3 A That would not cause this type of fracture at the
4 growth plate that would cause a shaft fracture but not one
5 that would stretch the periosteum giving you a corner
6 fracture.

7 Q Traction was one word you used about right ankle
8 injury and what was the other word, traction or?

9 A I may have used direct blow.

10 Q Direct blow?

11 A Direct blow to growth plate very difficult to do
12 that.

13 Q Would a karate chop be a direct blow?

14 A That would be extremely difficult due to this to
15 this ankle because of the nature of it it would be more of
16 something pulling at the, what they call paracardial ring.

17 Q I'm trying to get you to describe a direct blow
18 and what you mean by a direct blow. You've talked about
19 traction, we understand that. Tell me about a direct blow.
20 A hammer? How about a hammer?

21 A It's unlikely that this was caused by a direct
22 blow. It's a possibility that you could cause a growth plate
23 injury by pushing on the opposite side. The most likely
24 cause of this injury given this age and size of the patient
25 is one of a traction injury either pulling it or shaking the

A-109

1 child, and it is associated with children who are shaken, one
2 of the findings that you have.

1 3 Q How about if a sibling pulled the leg that would
4 be traction; would it not?

5 A Certainly that could be.

2 6 Q Incidentally, would you include injuries resulting
7 from interplay between siblings to be child abuse?

8 A There have been people who are experts on child
9 abuse who have stated that if children are routinely injured
10 without supervision because of their siblings that in fact
11 may be considered a form of child abuse if that's answering--

3 12 Q I guess could you answer my question yes or no?

13 A Well could you state your question again. I'll
14 see if I can do that.

4 15 Q Absolutely. Could interplay between siblings
16 wherein one child is injured be termed child abuse under your
17 definition?

18 A Yes.

5 19 Q Thank you. Now, the expert witness heretofore
20 appearing in this case did describe the possibilities of the
21 right ankle injury as resulting from a pull or a twist would
22 you agree with that twist?

23 A No, I would not.

6 24 Q Would you agree with that twist?

25 A No, I would not.

A-110

7 1 Q Now, how many fractures resulted in the swelling
2 that you observed on the child on the right ankle?

3 A Most likely the two bones that were broken the
4 tibia and fibula, which would be considered that ankle
5 fracture. There were two bones. If you say how many
6 fractures there were two fractures, but it was only one
7 ankle.

8 8 Q Could you tell the age of those two fractures?

9 A Yes, to within--it was less than two weeks more
10 likely less than one week based upon this radiographic
11 appearance and this age.

9 12 Q Were they the same age?

13 A They appeared to be.

14 Q The same age?

15 A They appeared to be.

1 16 Q So to say they're within two weeks or one week is
17 really not quite accurate. Your testimony is that both
18 fractures appeared to be of the same age which leads me to
19 conclude, doctor, that they both occurred at the same time,
20 would that be your conclusion?

21 A My conclusion would be that they both occurred in
22 the first, within a week. You cannot differentiate any
23 closer than that.

2 24 Q Okay. I guess you have said they appeared to be of
25 the same age meaning they could have occurred at the same

A-111

1 time or could have occurred within one week?

2 A That's correct.

3 Q Okay. Only those two fractures were shown on
4 Exhibits 1 and 2?

5 A I think my prior testimony--

6 Q I don't care about your prior testimony. Would
7 you mind looking at the exhibits and telling me the answer
8 please?

9 A You're asking only those two were seen on Exhibit
10 1 and 2.

11 Q Yes, sir.

12 A In my opinion there's a tibia shaft fracture as
13 well which makes a third fracture.

14 Q Are you able to definitively state that?

15 A Yes.

16 Q Three fractures shown in 1 and 2?

17 A Yes.

18 Q The first two of the right ankle and the third one
19 was where?

20 A The tibial shaft.

21 Q Also in the right ankle?

22 A No, that's in the lower mid portion of the lower
23 leg.

24 Q Tell me about that fracture. Is that the same age
25 as the other two?

A-112

1 A No.

2 Q What that take the same type of force as the first
3 two fractures about which you've testified?

4 A No.

5 Q What type of force would most probably cause the
6 third fracture shown in Exhibits 1 and 2?

7 A That would have been consistent with a direct
8 force on that, such as your karate chop.

9 Q Hammer?

10 A Hammer, karate chop, things like that.

11 Q I understood the last expert witness produced by
12 the Commonwealth testified that all three fractures shown in
13 1 and 2 are also shown in 3; would you agree with that?

14 A There appears to be a tibial shaft fracture in
15 here. As I previously stated I cannot absolutely state that
16 this is the right or left because the extra marker is not
17 seen. I don't see all three fractures on Number 3 that I see
18 on 1 and 2.

19 Q Okay. The two fractures that you do see on 3 are
20 both of the right ankle?

21 A No, I see a tibial shaft fracture. I'm really
22 having some difficulty seeing the ankle on this x-ray in this
23 light.

24 Q So I guess you're telling the jury that 3 also and
25 only solely shows the tibial fracture?

A-113

1 A What I'm saying in this light this is all I can
2 see here and say definitively. It may be on the originals or
3 on this on a view box I might be able to see more of it than
4 here.

5 Q Are you saying those exhibits being copies you
6 might not be able to see everything that would be
7 demonstrated on the originals?

8 A That's possible.

9 Q Is that what you're saying?

10 A That's possible certainly in this light without
11 x-ray view box.

12 Q Doctor, Exhibit 4 what does that show?

13 A Well, as I've previously testified, it shows
14 tibial shaft fracture on the right, what appears to be a
15 periosteal reaction on the left ankle. Both of the ankles
16 themselves are obscured by the person holding the child's
17 legs. It shows a pelvis and two femurs. It shows normal
18 growth plates of proximal tibia and distal tibia, proximal
19 fibula and lower lumbar spine.

20 Q I guess we can get at what we need this way.
21 Doctor, how many fractures in addition to those shown in 1, 2
22 and 3 are shown on 4 in addition? Now you understand the
23 question?

24 A While being that I don't know what 3 is I really
25 can't tell you what x-ray 3 is of. I don't know if it's

A-114

1 right or left leg so I can't tell you how many in addition to
2 this. If it's the right leg, I can tell you that all total I
3 see two tibial shaft fractures. I see an ankle fracture of
4 the tibial and fibula. So I see at least four fractures.
5 And on the left on the opposite one, if three is of the other
6 one, there may in fact be a corner fracture. I can't answer
7 to that today. If you would like to present another x-ray
8 for me to look at, I can perhaps.

1 9 Q I'm sorry, doctor, I thought on direct examination
10 you did testify as to what your opinion of Exhibit 3 showed,
11 that's okay no problem. Do I understand that Exhibit 4 shows
12 how many fractures?

13 A It clearly in this light it clearly shows two
14 tibial shaft fractures. If you'd like me to speculate what I
15 can or can't see around the ankles, I would, but I would hate
16 to speculate this is too important.

2 17 Q I don't want you to speculate. When you mention
18 "in this light," quote unquote, when you are in the O R do
19 you have an intensified lighting system you put the x-ray up
20 against it and it's a much better lighting than it is here;
21 is that not true?

22 A That's correct.

3 23 Q So I guess what you're saying is that absent that
24 type of direct lighting that is afforded in the E R and
25 Operating Room you really can't for sure tell about the

A-115

1 number of fractures and whether they're in the left or right
2 or whatever?

3 A No, I'm not saying that. I can tell you that in
4 my opinion that this child and based upon what my opinion was
5 before without even viewing this that the child had tibial
6 shaft fracture and most likely both legs. Both ankles had
7 been injured and there were two bones broken in the right
8 ankle, therefore, my number of fractures would be minimum of
9 three on the right leg and what appears to be two more in the
10 left leg, plus two in the chest which would bring my total
11 to--

4 12 Q Doctor your lack of being definite concerns me.
13 You appear to be speculating as to whether or not some of the
14 fractures you mentioned exist?

15 A I'm trying to give you the benefit of--I have no
16 doubt in my mind there were a minimum of five fractures in
17 the lower extremities. I'm trying to testify as to this
18 x-ray, which I'm not satisfied with to testify here, but in
19 my opinion even if we throw this one away we're still talking
20 about five fractures in the lower extremities. If you count
21 this one, there's another fracture.

5 22 Q I guess I'm just trying to ascertain from whence
23 the information came that leads you to the conclusion there
24 are at least a minimum of five fractures in the lower
25 extremity. I'm trying to get this through reading of the

A-116

1 x-rays which have been put into evidence by the Commonwealth,
2 which have been used through out this trial to date, and are
3 you able to tell me what five fractures are shown in the
4 x-rays with this lighting? Yes or no?

5 A Yes.

6 Q Okay tell us now again once more?

7 A There are two rib fractures.

8 Q Wait a minute you're talking about what exhibits,
9 talking about lower extremities?

10 A We have right ankle with a fibula.

11 Q Shown by what?

12 A And a tibial fracture.

13 Q Two fractures?

14 A Two fractures of the tibia, one fracture by the
15 fibula shown by Exhibits 1 and 2 and Exhibit 4.

16 Q Please doctor. How many fractures are shown in 1
17 and 2 collectively Exhibits 1 and 2? I want to go over this
18 again.

19 A Exhibit 1 shows and 2 both show a fracture of the
20 tibial shaft, a fracture of the distal tibia and a fracture
21 of the fibula.

22 Q That's three fractures?

23 A That's right, that's what I've said.

24 Q Alright. Now, doctor, you can't tell as to
25 Exhibit 3; is that true?

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1 A I can tell there are fractures on Exhibit 3. What
2 I'm not willing to say whether that is a picture of the right
3 or left. If you can definitively say it is of the left, I
4 can tell you how many I can see there.

5 Q You don't know whether they're same fractures as
6 shown in exhibit 1 and 2?

7 A That's correct based upon what you've given me to
8 look at.

9 Q I've got three fractures shown in 1 and 2. We
10 can't use 3 for sure. What additional is shown in 4?

11 A You can see a tibial shaft fracture.

12 Q Of what leg?

13 A Of the left leg.

14 Q Now the other tibial shaft fracture of the right
15 leg?

16 A They're distinctively different that's correct.

17 Q Anything else?

18 A Well, if you would met let me walk to the window I
19 can hold it up to the window.

20 Q Doctor, sure do anything you can to answer my
21 question, anything you can.

22 A I can only see the tibial shaft fracture on 4 as
23 on the left leg.

24 Q Thank you. Now, so far we can specify four
25 separate and distinct fractures in the four x-rays; is that

A - 118

1 true?

2 A That's correct.

3 Q Now, I don't know whether we talked about the
4 first two fractures you said were caused by traction or I
5 thought you said a direct blow; is that true?

6 A My opinion in this case, this specific case that
7 was caused by traction.

8 Q The next tibial fracture or both tibial fractures,
9 I guess, to the right and left were caused by direct blows
10 such as a hammer; is that true?

11 A Whether it was a hammer or piece of wood, a hand
12 it was something that caused a direct blow.

13 Q Okay I'm not picking on you.

14 A I really wouldn't expect a hammer to be used
15 without seeing more crush injury to the skin so I don't like
16 that analogy.

17 Q Now, the rib fractures we haven't talked much
18 about those except that they exist and are shown in
19 Commonwealth Exhibit 5. There are two fractures as I
20 understand it, one to the right rib cage and one to the left
21 cage, 6 and 7th ribs respectively; is that true?

22 A Yes.

23 Q They are known as in place fractures; is that
24 true?

25 A I've never heard anybody really describe it in

A-119

1 place.

2 Q I thought the Commonwealth's last witness or last
3 expert witness but how would you describe it?

4 A They were rib fractures.

5 Q That means?

6 A Non displaced. There is displaced open fractures,
7 closed fractures it means ribs were broken best described as
8 healing fractures. No way at this point in time whether to
9 say they were displaced or not.

10 Q How old were the rib fractures?

11 A Those rib fractures show advanced healing, they
12 show evidence of remodeling and as such based upon that it
13 would be an excess of six weeks.

14 Q Did you state a period?

15 A It appears this would, it would be four to six
16 weeks, beyond four and most likely around 6 weeks.

17 Q What based upon your experience and opinion what
18 type of force would cause the rib fractures?

19 A As I previously stated, there are two types of
20 forces one would be a compression and that also could be what
21 has caused it. I would have expected to see more fractures.
22 It is possible as they were bilateral it was a direct
23 compression caused at the same time. The other thing it could
24 be a direct blow such as with your hammer.

25 Q If I went up and squeezed you and were strong

A-120

1 enough, would that be a compression type force?

2 A Yes.

1 3 Q Is there any other type of force that you might
4 well expect would cause this type of rib injury?

5 A No.

2 6 Q Now, I guess you did in fact render an opinion
7 that these injuries based upon your experience were caused by
8 child abuse; is that what you said?

9 A Yes.

3 10 Q And you described child abuse as any activity or
11 inactivity that would cause mental or physical pain or injury
12 to a child or lessen that child's well being?

13 A Yes.

14 Q Would that be correct?

15 A Yes.

5 16 Q And I assume that lack of criminality would be
17 just as consistent as criminality within that definition; is
18 that true?

19 A No.

6 20 Q Why would that be?

21 MR. LEBER: Judge, I think I'm going to object
22 to that line of questioning. It's come up before, but I
23 think it probably is putting the witness in a position of
24 making a legal determination, which I do not think he should
25 have to do.

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1 MR. FINK: Judge, I agree with that, I agree
2 with that. I can see the error of my ways in the question
3 that I presented.

4 THE COURT: Ladies and gentlemen, counsel
5 have basically both agreed that the issue of causation and
6 what is and what is not criminal conduct is something covered
7 really in the instructions that I'll give you at the end of
8 the trial. I'm glad everybody agrees on that.

9 Q Let me ask it this way, doctor, when you say
10 that--when you rendered an opinion that these were caused by
11 child abuse it could be neglect; could it not?

12 A It seems that my definition includes that as a
13 form of child abuse.

14 Q It does include neglect?

15 A Neglect, yes.

16 Q It includes lack of proper parenting such that one
17 might not at all times be aware of the dangers that the child
18 is in and, therefore, the child could come to injury; is that
19 not true?

20 A In the broadest sense, yes.

21 Q And so when you render an opinion within a
22 reasonable degree of medical certainty that these injuries
23 were caused by child abuse, that is within the perimeters of
24 your definition; is that true?

25 A Yes.

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1 MR. FINK: Thank you very much, doctor, I
2 have nothing further.

3 THE COURT: Any redirect?

4 MR. LEBER: Yes, Your Honor briefly

5
6 REDIRECT EXAMINATION BY MR. LEBER:

1 7 Q The right ankle fractures again those are
8 fractures to what two bones?

9 A The tibia.

10 MR. FINK: Objection already asked and
11 answered it's not proper redirect examination.

12 THE COURT: I believe that has been certainly
13 covered.

14 MR. LEBER: Judge, I apologize I thought it
15 needed clarifying on that point. It seems to me some
16 confusion was generated, but I'll move on.

2 17 Q Mr. Fink asked you about the issue of neglect in
18 your definition of child abuse and so forth and he asked you
19 whether the interplay between siblings may be considered to
20 be child abuse and you answered that it could be. Under what
21 circumstances could that be?

22 A Where one child goes about inflicting repeated
23 injury to another child when the supervising adults should
24 have been able to prevent that. Certainly having a single
25 accident is understandable to children wrestling together,

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1 but one would expect to teach the older child they can't play
2 with the baby that way. Certainly those types of things
3 would fall in that definition. Having one child be jealous of
4 the other child and repeatedly injuring the child that could
5 be considered abuse because the supervising adults should
6 have been able to add protection for that, to recognize that
7 type of thing.

3 Q In Exhibit 5 you talked of rib fractures, you
8 talked about compression fracture or direct blow as being
9 possible causes of that type of fracture. I don't believe
10 you concluded when we were talking about, you and Mr. Fink
11 were talking about compression fracture. Do you have an
12 opinion as to whether they were caused by compression
13 fracture or direct blow?
14

15 MR. FINK: I guess I'm going to object to
16 that as having been covered. Clearly he described what
17 compression fracture is to the injury.

18 MR. LEBER: But we were discussing these
19 particular injuries caused by compression.

20 MR. FINK: I think he so testified.

21 THE COURT: I'm not certain on that. As to
22 this specific question witness may answer.

23 A The fact that they occurred very closely together
24 and in a very narrow band up until just recently I wasn't
25 aware of how you could compress in such a narrow band. It

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1 appears that some people would inflict punishment on children
2 by wrapping a belt around--

3 MR. FINK: I'll object to that I ask that the
4 jury be instructed to disregard it.

5 THE COURT: Objection is sustained, jury will
6 disregard that.

4 7 Q Again the question could this have been a
8 compression fracture?

9 A Other than anything causing very narrow
10 compression it would be more consistent with a direct blow.

5 11 Q Now, when one picks up the baby, small child one
12 frequently reaches out, puts their hands around the chest
13 area the rib area of a child and lifts the child up. Is
14 there any relationship between that kind of a grip on the
15 child and injuries you see here?

16 MR. FINK: Objection there's no basis for
17 that testimony, there's no basis for that question, it's a
18 hypothetical. In essence there's nothing on the record to
19 support it. Furthermore, it's--

20 THE COURT: I think I'll sustain.

21 MR. LEBER: Okay thank you, Your Honor.

22 MR. LEBER: I don't believe I have any more
23 questions, Dr. Supinski, thank you.

24 MR. FINK: Nothing further thank you, doctor.

25 THE COURT: Thank you, witness may step down.

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MR. LEBER: Dr. Asar please.

M A R I A M A S A R, M.D., having been duly sworn, was
examined and testified as follows:

DIRECT EXAMINATION BY MR. LEBER:

Q Your name and address, please?

A My name is Dr. Mariam Asar. I live on Route 6, 1
Port Allegany Road, Coudersport Pediatrics.

Q And your occupation?

A I am pediatrician.

Q And how long have you been a pediatrician?

A Three and a half years now.

Q What is a pediatrician?

A A pediatrician is a physician who specializes in
children's health and those issues.

Q Can you tell us about your medical education.
Let's start with when you first attended medical school.

A Yes, I did my medical school in Pakistan where I
received my Bachelor of Science and Bachelor of Medicine
Degree. From then I moved onto United Kingdom where I did
several years in obstetrics as well as pediatrics and I have
my license to practice in United Kingdom. I came here in
'91, did my residency out of Albany Medical Center Hospital
from 91 to '94 and since then from '94 I have been in

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1 Coudersport. I did my board certification in '95 and received
2 my fellowship in '96 of the American Board of Pediatrics.

1 3 Q And so your license is in what area?

4 A Pennsylvania.

2 5 Q What particular area?

6 A In Pediatrics.

3 7 Q Are you a member of any societies?

8 A Yes, I am. I am a fellow of the American Academy
9 of Pediatrics. I am member of A M A and Potter County as
10 well as Pennsylvania Medical Society.

4 11 Q And tell us specifically what type of training, if
12 any, you received relative to the issue of child abuse?

13 A Yes, when you do your pediatric training the
14 residency is three year residency. You see children right
15 from the beginning until the end, and I did see a fair amount
16 of child abuse being in an area where you see inner city
17 children. This was a medical hospital, school.

5 18 Q And is there any other specific training that
19 doctors who are licensed in Pennsylvania are required to
20 undertake relative to child abuse?

21 A You're not required to, but I have received, I
22 have continued the continuing medical education in various
23 areas. You need about 50 units of C M E. I have 300 units
24 in the last year for C M E.

6 25 Q And what states are you licensed to practice

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1 medicine in?

2 A In America in Pennsylvania only.

7 3 Q And again you've been in Coudersport since 1994;
4 is that correct?

5 A That's correct.

8 6 Q And you're affiliated with what medical facility?

7 A Charles Cole.

9 8 Q During the course of your professional practice
9 here in Coudersport have you had occasion to be the treating
10 physician for one Rebecca Moore?

11 A That is correct.

12 MR. LEBER: Your Honor, I'm going to offer
13 Dr. Asar in the area of pediatrics and in the area of child
14 abuse.

15 THE COURT: Counsel may cross as to
16 qualifications.

17 MR. FINK: Doctor, I have no
18 cross-examination, but would like to extend a belated welcome
19 to the doctor.

20 A Thank you.

21 THE COURT: Very well, Dr. Asar will be
22 received as expert in pediatrics and child abuse.

0 23 Q Dr. Asar, this has come up with the two previous
24 physician's training who testified in this case do you have a
25 definition of child abuse?

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1 A Child abuse at various times is maltreatment of a
2 child in any form is child abuse. Physical abuse is
3 infliction of physical injury to a child through malicious,
4 cruel or inhumane treatment, that's physical abuse. Then you
5 have emotional and sexual abuse too. In this case I think we
6 are going to limit to physical abuse.

1 7 Q You indicated before that you were the treating
8 physician for Rebecca Moore. When did you first encounter
9 Rebecca?

10 A When the child was six days of age, she was seen
11 in my office with jaundice. At birth the mom had directed me
12 as a physician covering for the child, but I must have been
13 away or whatever. She was taken care of by my colleague Dr.
14 Condon.

2 15 Q Now, the date of birth according to your records
16 for this child is what?

17 A I don't have it with me, but February 23, 1996.

3 18 Q Now, in September, specifically September 24, 1996
19 did you have the occasion to see Rebecca?

20 A I had occasion to see Rebecca on several occasions
21 before this particular date. The last time I seen her when
22 the child was about four and a half months of age at which
23 time she received her regular well child visit and physical,
24 plus immunizations. In September, I believe 24th of September
25 as I was leaving my office which was about 12:15, 12:25 this

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1 child was brought in. I did not see who was accompanying the
2 child except mother. My main concern was the mom who just--
3 she had the child bundled and she just happened to uncover
4 the extremity, that right extremity, lower extremity, showed
5 me the child's leg which appeared bruised. My understanding
6 at that point was that another sibling had fallen on this
7 particular child. It happened hour or two before her
8 presentation at my office. It was lunch time, my staff had
9 gone. I gave her x-ray form to go to the hospital and to
10 bring the child back to my office. Once the x-ray is done
11 and anything needed, if you will, is done at that point
12 whatever is needed for the child is done.

4 13 Q Okay. And did the to the best of your knowledge
14 these individuals went to the hospital; is that correct?

15 A That is correct.

5 16 Q Following their visit to the hospital did you have
17 occasion to review with Dr. Dallaire her radiological
18 findings, her findings from x-rays?

19 A I was called on the floor which I often am. If
20 there is a concern people do call me I prefer to be called
21 even if it is a bruise I prefer to be called. I was called
22 by Dr. Dallaire. There is a corner fracture of the right
23 lower extremity at which point, at that point there had been
24 x-rays of the other extremity to look at and see to get
25 comparative views. And I was told there were other fractures

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1 too, at which point I recommended or requested rather that we
2 take the skeletal subway, which is x-ray of all the long
3 bones as well as the skull to look for physical abuse or
4 injury.

6 5 Q Now, let's go back to when you saw Rebecca Moore
6 outside your office on that date. Can you describe for the
7 jury what her extremity looked like that you saw, you
8 observed at that time?

9 A The brief glimpse I did receive outside the office
10 on the road to me it looked a little bent and bruised, and my
11 concern like I said before was to send this child for
12 appropriate treatment right away and then to bring her back
13 for full history and exam, et cetera.

14 Q Now, you indicated earlier too that before you saw
15 this child on September 24th you had last seen her when she
16 was approximately four and a half months old; is that
17 correct?

18 A That's correct.

8 19 Q And on September 24th the child would have been
20 approximately seven and a half months old?

21 A Around that age, yes.

9 22 Q The child that you saw at four and a half months
23 old can you describe that child in terms of its health and so
24 forth?

25 A The child had been healthy all along up to the

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1 four and a half months that I had seen her.

2 Q And did you observe anything that would suggest
3 any type of fractures of any limbs or any part of her body?

4 A No.

5 Q Now, after you received the report from Dr.
6 Dallaire and you requested the additional survey, what did
7 you do then?

8 A Once I got confirmation that child had rib
9 fractures as well along with several other fractures I
10 contacted the Children and Youth, who are there for
11 protection of the children to make sure that the necessary is
12 done. I did not want the parents to leave the hospital even
13 to come to my office. I wanted her dealt with right there
14 and then, as well as I called Dr. Supinski and requested for
15 a consult to deal with the fracture.

2 16 Q Did you meet with Mrs. Moore, the mother, and Mr.
17 Bailey at any time?

18 A To be honest with you I don't remember dad as much
19 as I do mom, whoever brings the child over. In fact, I don't
20 recall anybody being there except the mother, who had the
21 child in her hand on that date. I did call the mom and speak
22 to her over the phone and told her I would be talking to
23 Children and Youth about this.

3 24 Q Now, since September 24, 1996 has Rebecca Moore
25 continued in your care?

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1 A That is correct, up to today's present date.

2 Q When was the last time you actually saw Rebecca,
3 if you can recall?

4 A I believe October 13th was the last time she was
5 seen, about 20 months.

6 Q October 13th then of 1997?

7 A That's correct.

8 Q Again you said she's about 20 months at that time?

9 A Around about that age.

10 Q Between the time this child was seven and a half
11 months on September 24th of 1996 and October 13th of 1997 did
12 you observe any other fractured bones or any other complaints
13 that would suggest child abuse relative to this child?

14 A No.

15 Q Now, during the course of your service for Rebecca
16 Moore did you have an opportunity then to further consult
17 with Dr. Supinski and Dr. Dallaire relative to this
18 particular incident and their findings on September 24th
19 1996?

20 A I don't believe so. As soon as we figured--I
21 didn't speak with Dr. Supinski, I don't believe I did, but I
22 did speak with the radiologist who in effect was good enough
23 to call me over the phone and inform me about the various
24 fractures. I just put in a consult to Dr. Supinski. I don't
25 think we spoke about anything further.

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Q Based upon the facts of which you were aware at this time, based upon the report that was given to you by Dr. Dallaire and based upon your experience with this child both before and after this incident on September 24th of 1996, and also based upon your training and expertise did you reach a conclusion or an opinion as to how these injuries occurred to this child?

MR. FINK: I'm going to object to that as leading. If Your Honor please, counsel can ask if she has an opinion and ask her how that is based, but counsel is suggesting to the witness what the basis of her opinion is and that's why it's leading.

THE COURT: Certainly can ask the witness if she has an opinion, then we can get basis for it.

MR. LEBER: Let's do it that way.

Q Do you have an opinion as to what caused these various injuries?

A Yes, with hindsight now.

MR. FINK: Question has been asked and answered.

Q Dr. Asar, Mr. Fink says that's a yes or no. No question you've answered yes?

A Sure.

Q What do you base your opinion upon?

A Well, there are various factors that come into

A-134

1 effect. One is this actually happened on a Thursday looking
2 back at things and child was not brought in until Monday
3 lunch time and at the time nobody made a call. This child
4 should have been seen on Thursday. The second thing there are
5 various fractures of various ages that were picked up and rib
6 fractures and that itself are really suggestive of
7 pathognomic abuse, corner fracture is another fracture a
8 pathognomic of child abuse and less proven otherwise.

3 9 Q Specifically, I know it's repetitive what is it in
10 your background that upon which you rely in forming an
11 opinion in a case, in this case or in any case such as that,
12 as this?

13 A Your experience, literature, you look at
14 everything, you look at the parents. This mom had been pretty
15 good with follow ups until about four and a half months after
16 which I did not see this child and then all of sudden I'm
17 seeing a child at lunch time brought in, making it appear
18 that injury had occurred more or less the same morning and
19 that was my assumption until I came to know this actually had
20 happened four days before, which is I think a form of neglect
21 if not abuse.

4 22 Q And based upon your experience as you described it
23 and what you've observed that day and what you learned from
24 Dr. Dallaire again did you, do you have an opinion, as you
25 said you have an opinion what is your opinion as to the

A-135

1 causation of these injuries?

2 A To me I don't have an opinion except abuse. This
3 child was abused especially with the hindsight which is
4 always 20/20.

5 MR. LEBER: Thank you nothing else.

6 THE COURT: Counsel may cross.

7

8 CROSS-EXAMINATION BY MR. FINK:

5 9 Q Doctor, I heard about one tenth of what you said.
10 Your English is excellent so it's not your English it's my
11 hearing, plus you have a voice I have tough time picking up.
12 I guess if you find my questions redundant or repetitive
13 please excuse me.

14 A Sure.

6 15 Q You first became the child's doctor when please?

16 A I was designated as a physician by the mother.

7 17 Q Excuse me, it requires an answer as to a date or
18 time. Give me a date if you can.

19 A I saw the child six days of age.

8 20 Q Six days of age?

21 A Six days, when the child was a week old.

9 22 Q Did you give me a date?

23 A I gave you the time, the child was one week old.

0 24 Q Thank you, got you. So you had been the child's
25 doctor since the child was one week old and you remain so

A-136

1 today; is that correct?

2 A That's correct.

1 3 Q And how did it come about that you became the
4 child's doctor?

5 A The mother designated me as the child's physician
6 because I had taken care of the older sibling.

2 7 Q Fine that's fine. The mother contacted you a week
8 after the child was born and you became the child's doctor;
9 is that correct?

10 A Actually the mother designated me at birth. We do
11 cross cover. The child was covered by another pediatrician
12 at the time of birth.

3 13 Q I see. Well, does that mean that you, when someone
14 is expecting they pick a physician and then when the child is
15 born they give the name of that particular physician?

16 A Yes.

4 17 Q Okay.

18 A So I was actually the child pediatrician from
19 birth. I didn't actually see the child until one week of
20 age.

5 21 Q You were contacted next when in relation to the
22 care of the child?

23 A At two weeks of age.

6 24 Q Two weeks?

25 A Hm-hmm.

A-137

7. 1 Q And next do you have some record of when you were
2 next contacted with you?

3 A I personally I do have records.

8 4 Q Is that available? Could I see it, please?

5 A Sure.

9 6 Q Thank you very much. You have gotten out of your
7 brief case a folder and that folder you were presenting to me
8 to look over, and it represents a written record of when you
9 were contacted concerning the care and treatment of the
10 child?

11 A Yes.

0 12 Q Thank you.

13 MR. LEBER: Judge, can we approach on this
14 real briefly.

15 THE COURT: You may.

16 (Discussion held at the Bench off the
17 record).

1 18 Q Doctor, I would just a soon have you look at your
19 own records I don't need to see them.

20 A Thank you.

2 21 Q To refresh your recollection as to when you were
22 contacted the chronology as to when you were contacted by
23 whom and for what concerning the treatment of the child?

24 A Right from birth.

3 25 Q Sure.

A-138

1 A I saw the child at six days of age with jaundice.
2 Then the child was seen two weeks for a regular physical
3 which was normal. The child, children are normally seen at
4 two weeks for a regular physical. Then the child has been
5 seen at six weeks with just a cold following that this child
6 was seen at two months of age when she received a regular
7 physical as well as immunizations.

4 Q Now, doctor up to this time are these contacts
5 with the child at the insistence and request of the mother?

6 A That is correct.

7 Q Continue we're up to two months.

8 A At three and a half months this child was seen for
9 ear infections.

10 Q What kind of infection?

11 A Ear infection.

12 Q Did you treat the ear infection?

13 A That is correct.

14 Q Was there any indication that came from any type
15 of trauma?

16 A No.

17 Q Okay. This child was then seen at four months of
18 age again for regular physical and immunizations and--

19 Q For what?

20 A Regular physical and immunization.

21 Q For a physical. When you perform a physical on a

A-139

1 child at four months what do you do?

2 A You look at the child, examine the child from top
3 to bottom starting from the head, go to the feet.

4 Q And at four months you were convinced there was no
5 injury as a result of any trauma; is that true?

6 A That is correct.

7 Q Next time?

8 A This child was then seen on September 24th when
9 parents--

10 Q So it goes from four months old. What was the
11 date of that when child was four months old?

12 A 6/96.

13 Q June of 96?

14 A That's correct.

15 Q Okay so June of 96 everything was alright; right?

16 A To my knowledge.

17 Q Do you have a date there?

18 A June 19th.

19 Q June 19th. Then three months and five days after
20 was the next time you saw the child?

21 A That is when they drove up with the child pointing
22 to the extremity.

23 Q Okay.

24 Q How were you contacted to effectuate the September
25 24th contact?

A-140

1 A I was not contacted. As I was leaving the office
2 about 12, parents just drove in with the child and to me it
3 appeared that something had happened in the morning that is
4 why they were driving up, nobody contacted the office to make
5 an appointment. I just saw this child in the mother's arms
6 and she just uncovered the leg to show me right extremity
7 which had the bruise.

1 8 Q Okay. Was the the child awake or asleep?

9 A The child was awake and fine.

2 10 Q Was the child crying?

11 A No, the child wasn't crying.

3 12 Q The child appeared normal?

13 A Without undressing the child, yes.

14 Q The child appeared normal, the mother uncovered
15 the child and showed you what portion of the child?

16 A Just the right lower extremity.

5 17 Q What did you see?

18 A I saw the bruise on the right lower extremity.

6 19 Q Did you see any other bruises?

20 A I did not undress the child. I wanted to get this
21 child to the hospital.

7 22 Q Excuse me, you don't have to explain.

23 A No, I didn't.

8 24 Q That's fine. If you'd be kind enough to just try
25 to answer my question then you can explain until the cows

A-141

1 come home. Forget the cows come home, that's an expression,
2 I shouldn't say that.

3 A I did not look for any other bruises let me put it
4 this way at that time.

5 Q Where did the child go from there?

6 A I give them an order form to go to the hospital
7 and get the limb x-rayed.

8 Q Your office is not at the hospital?

9 A No, it's about a mile down from the hospital.

10 Q Okay, alright. Here's my client in back of me.
11 Did you see my client?

12 A I don't recall anybody else except the mother and
13 the child.

14 Q Okay. You accompanied the mother and the child to
15 the hospital?

16 A No, I didn't.

17 Q You did not?

18 A No, I did not see a reason at that point.

19 Q When did you next see the child?

20 A After this incident.

21 Q After September 24th you said, you told us the
22 circumstances under which you saw the child. When did you
23 see next see the child?

24 A September 30th when the child was brought by the
25 foster mom.

A-142

6 1 Q The child was what?

2 A The child was brought to office by a foster
3 parent.

7 4 Q Did you follow the treatment as far as the right
5 ankle is concerned?

6 A That is correct. The child's leg was in a cast at
7 that time.

8 8 Q It was what?

9 A In a cast.

9 10 Q Now you have rendered an opinion here concerning
11 the source of the ankle injuries and I guess others. It is
12 my understanding in rendering that opinion you took into
13 consideration what one thing at that time, what items did you
14 consider in arriving at the opinion that these injuries were
15 caused from child abuse or that this child was abused?

16 A Okay. The child was presented on Monday at lunch
17 time.

0 18 Q What Monday?

19 A Monday the 24th of September.

1 20 Q You're considering when you saw the child on the
21 24th of September?

22 A That is correct.

2 23 Q What did you see that you considered in arriving
24 at your opinion?

25 A I found out that this child actually had on

A-143

1 Thursday had suffered--

2 Q What did you see on September 24th that you
3 considered in arriving at your opinion? You understand the
4 question?

5 A No, I don't.

6 Q Okay. It is my understanding that you have told
7 us there were certain considerations that you, certain things
8 that you considered in arriving at your opinion?

9 A Yes.

10 Q As to the abuse of the child?

11 A That is correct.

12 Q I've asked you what those are. One of them, first
13 one, as I understand what you saw on September 24th?

14 A Even before that if you take history.

15 Q Just one at a time. I confuse easily. I do. I
16 confuse easily. Let's go one at a time. If you want to
17 start with before that, that's fine. What was that you saw,
18 heard or considered beforehand which led you to the
19 conclusion that the child was abused?

20 A The mere fact that this child was brought four
21 days after the injury had occurred and I was not--I haven't
22 finished yet. I was not aware of this until later on in
23 time.

24 Q Okay. I understand the first thing is that the
25 child was not brought in for treatment on the ankle until

A-144

1 four days after the incident which gave rise to the broken
2 ankle; is that what you're saying?

3 A That is correct.

9 4 Q And that you weren't notified?

5 A Nobody in fact contacted my office to make an
6 appointment, the people just drove up to the hospital office.

0 7 Q Okay. Now how did you learn that there was an
8 incident which occurred on September 20th which gave rise to
9 the broken ankle?

10 A I came to find out through Dr. Dallaire and Dr.
11 Supinski.

1 12 Q This is important?

13 A I came to realize when the history was taken in
14 the Emergency Room that this child actually had--the mother
15 stated this incident happened on Thursday.

2 16 Q The mother stated, the mother said in the
17 Emergency Room that it happened, something happened four days
18 beforehand?

19 A That is correct.

3 20 Q Who did she tell that to?

21 A Dr. Dallaire and Dr. Supinski as well as Emergency
22 Room staff.

4 23 Q I didn't hear that. Are they still here?

24 MR. LEBER: Emergency room staff?

25 A It is stated in his notes. It is stated in Dr.

A-145

1 Supinski's notes stated in black and white mother stated 7th
2 month old sibling fell on Thursday on this child's leg. We
3 are not saying this incident, injury occurred because of
4 that. I am simply stating this child was brought four days
5 later.

5 6 Q You're telling the jury that because the mother
7 said that four days before a sibling or other child fell on
8 Rebecca--

9 A That is correct.

6 10 Q That an incident occurred four days beforehand; is
11 that true?

12 A What I'm trying to say that history was
13 inappropriate and did not fit with the findings.

14 Q Did you believe that she was telling the truth
15 when she said that?

16 A Right at that moment I did.

8 17 Q Did you believe that she was telling the truth?

18 A I did indeed I did.

9 19 Q Yes.

20 MR. LEBER: The witness is answering.

21 THE COURT: I need to have counsel come up
22 here.

23 (Off-the-record discussion held at the
24 Bench).

25 MR. FINK: That side bar was my fault I'm not

A-146

1 hearing I apologize to you. It's not your fault, your
2 English it's very good.

3 A Maybe I'm not speaking loud enough.

0 4 Q Now, again, I asked you if you believed that
5 mother of the child was telling the truth when you heard that
6 mother had said in the Emergency Room that another child had
7 fallen on Rebecca four days beforehand. Did you believe
8 that? Yes or no?

9 A This I came to know later.

1 10 Q Did you believe it?

11 A I did believe it. I had no reason not to.

2 12 Q Okay. Fine I agree. Would you term that or
13 construe that as being child abuse?

14 A I'm sorry.

3 15 Q When another child would fall on Rebecca?

16 A That's inappropriate supervision, sort of neglect.

4 17 Q That's child abuse?

18 A Neglect there are different definitions.

5 19 Q Got you. What else did you consider in arriving at
20 your opinion that the child was the subject of child abuse?

21 A Like I said, the history first of all from the
22 mother did not go along with the physical finding because
23 this was not an injury sustained from child falling on this
24 infant and the mere fact that this child had several
25 injuries, several fractures in various phases of healing.

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Q Let me cut right to the quick here if I can. I'm going to try to shorten this if I can. First question that was asked to you by Mr. Leber was you were asked to give your definition or your understanding of child abuse?

A That is correct.

Q It is my understanding that you believe that child abuse is any depreciation of the condition and of the child both mentally and physically from whatever reason or from whatever source; would that be true?

A I'm not sure if I understand you correctly.

Q Then you give your own definition once again.

A Physical injury to the child which is physical injury inflicted on the child through cruelty or any inhumane treatment, that's physical abuse. You have neglect where you do not provide adequate supervision, care, appropriate admonition of the child.

Q The source of the physical abuse can be from many many different types of sources legally and illegal?

A That is correct.

MR. FINK: Thank you, nothing further. I apologize to the Court.

THE COURT: No problem.

REDIRECT EXAMINATION BY MR. LEBER:

Q Dr. Asar, one or two questions if I may. Mr. Fink

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1 asked you again about when you heard the conversation of the
2 events that was offered by the mother at the Emergency Room,
3 that is a sibling fell on this child. Mr. Fink asked you if
4 you believed it, and you said you did believe it at the time;
5 is that correct?

6 A I did believe it at the time when it was given to
7 me. In retrospect, like I said, hindsight which is always
8 20/20 I find it difficult to believe now. I disagree, I
9 would not believe it.

10 Q Why do you not believe that now?

11 A Because of the findings.

12 Q Can you enumerate those? What is basis for that?

13 A History, which was inappropriate to the actual
14 finding four days later the child is brought for exam and the
15 finding of multiple injuries including rib fractures, corner
16 fractures that were described by Dr. Dalllaire, which would
17 be pathognomic of child abuse unless proven otherwise. These
18 are things that have been hammered into our heads when
19 training. If we don't pick these up, the child can come in
20 DOA which is basically dead on arrival to the Emergency Room.

21 THE COURT: Recross.

22 MR. FINK: I don't think so, Your Honor.

23 MR. LEBER: Thank you Dr. Asar. Thank you.

24 (End).
25

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COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
: OF POTTER COUNTY, PA

VS. : NO. 93 OF 1997

MARK BAILEY, : CRIMINAL DIVISION
Defendant

TRANSCRIPT OF THE REMAINDER OF THE JURY TRIAL, held
before the Honorable John B. Leete, President Judge, in the
Courthouse, Coudersport, PA, on December 16-17, 1997.

A P P E A R A N C E S:

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COPY

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I N D E X T O W I T N E S S E S

FOR THE COMMONWEALTH

	<u>Direct</u>	<u>Cross</u>	<u>Redir.</u>	<u>Recr.</u>
Kenneth Davis	154	156	176	
Alan Moore	178	183	184	
Lori Moore	184	192	204	208
Alice Carr	209	214		
Tammy Baker	215	223		
Chad Setzer	233	236	240 244	240 248

FOR THE DEFENSE

	<u>Direct</u>	<u>Cross</u>	<u>Redir.</u>	<u>Recr.</u>
Michael Hicks	283	289	--	
Martha Bailey	296	300		
Mark Bailey	306	340	364 367	365

REBUTTAL

Amy Tuttle	369	372		
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1 THE COURT: Take afternoon recess at this
2 time for approximately ten minutes. During recess do not
3 discuss case among yourselves or with anyone else. Thank you
4 very much. Court will stand in recess for ten minutes.

5 (Ten-minute recess).

6 MR. LEBER: Trooper Davis.

7 MR. FINK: Your Honor, may it please the
8 Court, may I have an offer of proof as to this next witness.

9 THE COURT: Go ahead.

10 MR. LEBER: Your Honor, Trooper Davis will
11 testify that on February 28th, 1997 that he had occasion to
12 interview the defendant at the Pennsylvania State Police
13 Barracks of Coudersport and at that time the defendant
14 confessed to this officer that he did break several bones of
15 Rebecca Moore, and that he related that this happened because
16 he could not control his anger, and Rebecca reminded him of
17 his son. And Trooper Davis further would testify that he
18 also was present when the tape recorded statement was taken
19 subsequent to that which was conducted by Trooper Dawson.

20 MR. FINK: May it please the Court, we'll
21 object to that as the corpus delecti has not been met. It is
22 my understanding, Your Honor, under the corpus delecti rule
23 it is a two-step process, and the first issue is whether or
24 not there has been testimony presented in court whereby the
25 it would indicate that it was more likely than not, quote

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1 unquote, or more likely than not that victim was harmed by
2 criminal conduct unquote. The next of the two step process is
3 that his Honor must charge the jury, as I understand the
4 rule, that they must find beyond a reasonable doubt that the
5 particular crime charged was proven other than by confession
6 and that the victim suffered from the crime.

7 Now, I respectfully submit that first step has not been
8 achieved so that the Court cannot allow any inculpatory
9 statements or confessions or admissions because I think
10 viewing the testimony in the most favorable light to the
11 Commonwealth one cannot conclude that the victim was, it was
12 more likely than not that victim was harmed by criminal
13 conduct.

14 THE COURT: Commonwealth I think that general
15 statement of law I believe to be pretty correct. Do you want
16 to comment on its applicability to this case?

17 MR. LEBER: My feeling is that corpus delicti
18 preliminary threshold requirement has been met. Certainly we
19 have the evidence of three expert witnesses to this point
20 indicating that they believe that the injuries that occurred
21 to Rebecca Moore were consistent with child abuse and all of
22 them said that they've believed that nature of it was at
23 least by indication was an act of child abuse. However, they
24 also said that neglect could be child abuse if that existed
25 and that if it was caused by another party. For instance, the

A-153

1 suggestion that there could, the one injury could have
2 occurred because the child falling on the--on her sister.
3 Again, I believe that the corpus delecti requirement has been
4 met simply by the fact these three experts have indicated
5 that this child was in fact the victim of child abuse.

6 MR. FINK: If I may reply to that, Your
7 Honor. Your Honor, as I understood the testimony of all three
8 expert witnesses under their definition of child abuse it is
9 not necessarily criminal at all and, therefore, I think, Your
10 Honor, that there's a big step here that needs to be taken
11 that has not, cannot be taken. Might I respectfully suggest
12 that even if you pass the first, if the Commonwealth passes
13 the first test at the conclusion of the trial of the
14 Commonwealth case, I would make the appropriate motions for
15 directed verdict of acquittal and or a demur based on the
16 fact that under no circumstances could the jury find that
17 beyond a reasonable doubt and they're not allowed to look at
18 the confession. So considering the other testimony before
19 they consider the confession that they could not find beyond
20 a reasonable doubt that the crime was committed and that the
21 victim was injured as a result of the crime, and I'm talking
22 about the crime, the crimes that are charged.

23 THE COURT: I think that's really what we
24 have to talk about. There's been a lot of discussion about
25 term child abuse but the defendant is not charged with child

A-154

1 abuse the defendant is charged with four counts of aggravated
2 assault, four counts of simple assault and four counts of
3 reckless endangerment of a child essentially, I paraphrased
4 the child, but that's essentially what it is, endangering the
5 welfare of children I believe is the formal title. So I'm
6 not sure that all these definitions, which I agree are in
7 part contradictory, that we've heard I'm not sure that they
8 answer the present query. I do think that the first threshold
9 has clearly been met because the three medical witnesses have
10 testified to events or occurrences or injuries which would
11 indicate that there were fractures in different parts of the
12 body at different times which at least thus far in the
13 Commonwealth case went untreated except for the events of
14 September 24th, if I recall the date correctly. Therefore, I
15 would--there also has been testimony that these, as to the
16 likelihood and probability, that these types of fractures can
17 and frequently do result from trauma, and again I'm very
18 generally paraphrasing the three health care providers. It
19 seems to me that initial burden has been met to show that
20 criminal means are essentially most likely involved in the
21 injuries that were suffered.

22 As to the second test, certainly the law is very clear
23 that jury has to receive that instruction, and I would
24 certainly intend to so instruct at the proper time. So the
25 offer is noted, the objection is noted and we will proceed.

A-155

1 We'll bring the jury down.

2 THE COURT: Ladies and Gentlemen, we had a
3 couple more matters to take care of on the record which would
4 not require your presence, but we got those out of the way
5 Commonwealth may proceed.

6 MR. LEBER: Trooper Davis please.

7

8 K E N N E T H D A V I S, having been duly sworn, was
9 examined and testified as follows:

10

11 DIRECT EXAMINATION BY MR. LEBER:

1

12 Q Your name and address, please?

13 A Trooper Kenneth L. Davis, P.O. Box 6889 Cherry
14 Street, Montoursville, Pennsylvania 17754.

2

15 Q And you are Pennsylvania State Trooper?

16 A That is correct.

3

17 Q How long have you been so employed?

18 A Approximately five and a half years.

4

19 Q And you are stationed in what barracks?

20 A Currently Montoursville.

5

21 Q That's what troupe?

22 A F Troupe.

6

23 Q Coudersport is part of that troupe; is that
24 correct?

25 A That's correct.

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Q And on February 28th, 1997, did you have occasion to be at the Coudersport Barracks?

A I did.

Q During that date did you interview the defendant in this case?

A I did.

Q And tell us what you did prior to questioning Mr. Bailey?

A He was mirandized.

Q By mirandized you mean what?

A I read him his rights, which he had acknowledged and signed off on a waiver form.

Q And after doing that tell us what you asked him and how he responded?

A Just asked issues about the injuries Rebecca Moore sustained, at which time he confessed to me being involved in four different broken bones, areas of the right leg, left leg, the ribs, at which time I notified Trooper Dawson.

Q Did Mr. Bailey give you any explanation why he had caused these injuries to Rebecca Moore?

A Yes, his anger and that she reminded him of his other child.

MR. LEBER: Nothing else, thank you, cross-examine.

A-157

1 CROSS-EXAMINATION BY MR. FINK:

2 Q Officer, how did it come about that you were from
3 Montoursville you got up here to Coudersport barracks?

4 A I was asked.

4 5 Q By whom?

6 A Trooper Dawson.

5 7 Q Why?

8 A Why? Lie detector test, a polygraph test.

6 9 Q A polygraph test is the same thing for the jury, a
10 polygraph is lie detector, right?

11 A Polygraph also detects the truth not only lies.

7 12 Q In common parlance those of us who are not really
13 familiar with the words of the trade so to speak refer to a
14 polygraph test as a lie detector test; don't we?

15 A Yes.

8 16 Q And so you came up to Coudersport to give my
17 client a polygraph test?

18 A Yes.

9 19 Q Does that require a certain machine to operate?

20 A A polygraph instrument.

0 21 Q And you were the operator of that; is that true?

22 A The examiner.

1 23 Q And there are not too many people in the troupe
24 that are able or qualified to give polygraph tests; is that
25 true?

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1 A There's one per troupe, approximately fifteen per
2 state.

3 Q You were called up from Montoursville on February
4 28th, 1997 or?

5 A We're dealing in 97 but approximately a month
6 before that that the test was scheduled or to be scheduled on
7 that particular day.

8 Q Nonetheless you came up, the defendant voluntarily
9 came in. He wasn't under arrest or anything?

10 A No.

11 Q And he voluntarily came in for the purpose of
12 submitting to a polygraph test; is that right?

13 A That's correct.

14 Q Now, do you ordinarily interview people who are
15 going to be giving polygraph tests before they take the test?

16 A Most definitely.

17 Q Is that what you did here?

18 A Yes.

19 Q That was a pretest interview; is that right?

20 A That is correct.

21 Q Is that done in a separate room where the test is
22 being given?

23 A No.

24 Q Is there any other officer around?

25 A In the beginning Trooper Dawson witnessed his

A-159

1 Miranda Rights being read.

2 Q I'm sorry, sir?

3 A In the beginning of the pretest I also qualify I
4 also count the mirandizing as a pretest, which Trooper Dawson
5 witnessed and signed off on the waiver form as a witness, and
6 Trooper Bailey--Mark Bailey also printed his name and signed
7 off on the waiver form, then it's just I and the examinee.

8 Q Now, it was just you and my client in the room
9 when you asked him certain questions?

10 A That is correct.

11 Q In the pretest?

12 A That's correct.

13 Q Do you have a copy of those questions specifically
14 verbatim that you asked?

15 A Yes.

16 Q And do you have those written down?

17 A Yes.

18 Q May I see it please?

19 A Alright. Which were shown to you also on our other
20 hearing.

21 Q Thank you, officer. Now what you have directed my
22 attention to is a form?

23 A That is correct.

24 Q And there is certain handwritten notes here. Who
25 made those handwritten notes?

A - 160

1 A I did.

2 Q The handwritten notes really show questions, do
3 they not?

4 A That is correct, questions intended to be used for
5 the polygraph test.

6 Q Were those questions written down on this paper
7 before you asked them or not?

8 A I think we were working on that when we were
9 discussing--

10 Q Sir, just yes or no question. Were these
11 questions written down on the paper before you asked them to
12 my client?

13 A No.

14 Q No. When did in relation to asking the questions
15 did you write these down on the paper?

16 A When we started talking about the injuries they
17 weren't written down on the paper prior to talking to your
18 client.

19 Q In the form the first comment is the name, which
20 is blank, the date which is blank and the incident number,
21 which is blank; is that true?

22 A That is true.

23 Q And the next line in the written form regarding
24 dash and you have written in there, "those broken bones of
25 Rebecca." When did you write that in relation to when you

A-161

1 questioned my client?

2 A After we talked.

4 3 Q After you were done?

4 A After we talked.

5 5 Q After you talked?

6 A Correct.

6 7 Q So you don't know whether this is exactly what you
8 told him or not?

9 A No, it is exactly what I told him, that's why it's
10 written down, but we discussed the case, the facts, the
11 reason why he's there prior to writing down the test
12 questions. Why should I write down something that may not be
13 used. It's a waste of time.

14 Q Okay. The first question is--well, you read the
15 first question.

16 A Certainly. "Regarding those broken bones of
17 Rebecca do you intend to answer truthfully to each question
18 about that?"

8 19 Q What's the answer?

20 A We didn't get that far, he confessed to the crime.

9 21 Q Also what's written down here is not a recording
22 of what my client told you?

23 A What do you mean.

0 24 Q That which is written on the sheet that you
25 presented to me is not a recording of what he told you; is

A-162

1 that true?

2 A I don't understand.

3 Q Do you understand the question?

4 A No, that's what I'm asking I don't understand.

5 Q You directed my attention to a particular paper
6 that you have in your folder after I asked you if you had
7 written down his answers.

8 A I didn't write down his answers.

9 Q You did not write down his answers. Did you write
10 down the questions that you asked him?

11 A Yes, they're right here.

12 Q The questions are written down but the answers are
13 not?

14 A Right because he started confessing, at which time
15 I got Trooper Dawson.

16 Q You say it's confessing, they're the ones that
17 will decide whether he confessed or not, that is their job.

18 MR. LEBER: I think we're arguing with the
19 witness here.

20 THE COURT: Yes, let's do this on a question
21 and answer basis without comments.

22 Q I apologize, Your Honor. Would you just tell the
23 jury whether or not you have a written statement of what my
24 client told you after or during the time you questioned him?

25 A No, I don't have anything written. We have it

A-163

1 taped.

2 Q You have a recording of it?

3 A Yes. I don't have it, Trooper Dawson has it.

8 4 Q Do you have a recording of what he told you when
5 you say that he confessed?

6 A No.

9 7 Q So you didn't bother to write down his confession
8 and you didn't bother to record what you say is his
9 confession; is that true?

10 A No, that's not true.

0 11 Q Is that true?

12 A No.

1 13 Q Okay. Did you record it?

14 A With Trooper Dawson.

2 15 Q Did you record what he told you, officer, I guess
16 you testified previously you didn't?

17 A No, I did not record it per say. Trooper Dawson
18 recorded after he told me. At that particular time he had
19 his hand in a cast, not able to write, at which time--I do
20 not carry a recorder--Trooper Dawson got his. We took a
21 taped statement.

3 22 Q Officer, you're telling me that Trooper Dawson who
23 is the complaintant here, he's the state police officer;
24 complaintant sitting at the prosecution table he recorded
25 something; right?

A-164

1 A That is correct.

2 Q Was that something what the defendant told you as
3 a result of your questioning my client?

4 A That is correct.

5 Q I thought you told me that the only ones in the
6 room at the time you did your pretest was my client and you?

7 A I was.

8 Q Then how did it come about that Trooper Dawson was
9 able to record what my client told you in answering your
10 questions when he wasn't there?

11 A After your client confessed to me, I said let me
12 get Trooper Dawson we'll go over what you told me. Then we
13 taped. There's no need to continue with polygraph test or
14 exam after a confession.

15 Q Let me try this way. Where did Trooper Dawson make
16 a recording of what my client said? Where at the barracks?
17 Was it in the room where you conducted your questioning?

18 A Yes.

19 Q Whose questions were answered by my client when
20 the recording took place?

21 A Trooper Dawson's.

22 Q That's not what I had asked you. What I asked you
23 was whether or not you have a recording of what my client
24 told you in response to your question?

25 A No, I do not have a recording of that.

A-165

Q Thank you. And you don't have that in writing either, do you?

A No, I do not.

Q Is it not usual that an investigating officer would put in writing what the defendant told him if it amounted to a confession?

A Yes, which we got a taped confession, which is better.

Q But what he told you wasn't taped; was it?

MR. LEBER: Judge.

A Yes, it is.

MR. LEBER: This is being redundant, it's repetitive. I think that testimony is clear of what happened here, and I don't know why we're beating this dead horse.

THE COURT: I suggest we're beating dead horse. We should essentially move on.

Q What did the defendant tell you which is not recorded, which is not written or of record, what did he tell you?

A We'll start with the rib injury. He mentioned that he may have squeezed too much.

Q What?

A The ribs, that he may have squeezed the child too much which caused those particular injuries. One of the leg injuries he mentioned that he dragged the child while in the

A-166

1 car seat out of the car, which may have caused that pulling
2 injury in that one particular leg.

5 3 Q Excuse me. Let's stop right there. As to the leg
4 did he tell you when that was done?

5 A He didn't give a specific time.

6 6 Q Did you ask him when it was done?

7 A I believe so but I would have to check the taped
8 statement.

7 9 Q Did you ask him who was there?

10 A Yes.

8 11 Q What did he say?

12 A Without looking at my notes.

9 13 Q You have notes?

14 A Well, the taped statement.

0 15 Q You have notes of his statement to you?

16 A I have a copy of Trooper Dawson's reports which
17 has the transcribed tape.

1 18 Q Officer, I've been accused of being redundant, of
19 asking same question. I have, that's true. What the
20 district attorney says is true. I keep getting different
21 answers. Do you have any notes, recordings of any kind of
22 what my client told you when you say he confessed, any notes
23 at all?

24 A With only me in the room, no. I have taped
25 statement afterwards, which is redundant of what he told me.

A-167

2 1 Q Officer, please, my questioning has to do with
2 what he told you, which you say amounted to a confession
3 which led you to call Trooper Dawson to get a recording;
4 right?

5 A Right.

3 6 Q What did he tell you?

7 MR. LEBER: Judge, this has been asked and
8 answered.

9 THE COURT: Well, as I understand it where
10 we are the witness has made comments that he attributes to
11 the defendant as to two alleged injuries. I don't know if
12 there are other comments as to other alleged injuries. If
13 so, if I understand, that's counsel's question.

14 MR. FINK: Thank you, your Honor. What I'm
15 trying to elicit from the witness is what my client told him
16 outside of Trooper Dawson's presence at the pretest.

17 THE COURT: I am under the impression that is
18 the answer that's being given.

19 A Right that is his question. My answer is same
20 thing he told me was same thing in the taped statement.

4 21 Q Tell us then what it is?

22 A I have to review the taped statement.

5 23 Q What are you looking at?

24 A A copy of the criminal incident report.

6 25 Q Is that a writing of what my client told you?

A-168

1 A What do you mean by writing?

2 Q Is that a record of what my client told you,
3 officer?

4 A Yes, yes, it is.

5 Q May I see it?

6 A Sure. Starting from there.

7 Q This is what my client told Dawson?

8 A That's the same what he told me he told Dawson.

9 Q He told you that he lived in Roulette
10 approximately 8 months. Did you question him?

11 A Yes, I have his address.

12 Q Your questioning, questions are the exactly the
13 same as Trooper Dawson's questions; is that true?

14 A No, the answers are the same. The questions--
15 you're asking me what he told me in the pretest prior to
16 getting Trooper Dawson in the room to get taped confession--
17 are the same. Is that hard to understand?

18 Q Yeah, it is.

19 THE COURT: I'll ask the witness to refrain
20 from questioning counsel.

21 Q Tell me what my client told you that amounts to a
22 confession as far as you're concerned?

23 A Sir.

24 Q You can use anything you wish to refresh your
25 recollection.

A-169

1 A I believe the last one we were talking about was
2 the car injury. Trooper Dawson asked same as I did the prior
3 two injuries. "One of them may have happened when I dragged
4 her out of the car, I was upset, bad day. Instead of being
5 easy I just grabbed the car seat and her leg was up against
6 the car seat when I grabbed it and I just grabbed and pulled
7 car seat out so I could get her out in the Carr and get her
8 into the house, and that was apparently the result of another
9 injury."

5 10 Q That's exactly the same as he told you when you
11 questioned him alone exactly?

12 A Not word for word but outcome is the same, yes,
13 car seat, pulled her out, grabbed her out.

14 Q He said he had a car seat, she was in a car seat,
15 right?

16 A That is correct.

7 17 Q He said he pulled her out of the car seat?

18 A That is correct.

8 19 Q And dragged her into the house is that what he
20 said?

21 A I could read it again. Yeah, one of them may have
22 happened when I dragged her out of the Carr. I was upset,
23 bad day, instead of being easy--

9 24 Q Excuse me, sir. Tell the jury what my client said
25 in your own words about that incident in your own words?

A-170

1 A My own words. She was in the car seat, he just
2 yanked on her leg to get her out of the Carr.

3 Q He yanked her out of the Carr?

4 A That's what it says here, yes.

5 Q That's a confession. Any other thing that he said
6 that was a confession. Officer, can you answer that
7 question?

8 A Yes.

9 Q What else did he say that amounted to a
10 confession?

11 A The other leg injury being child's leg was stuck
12 between the crib legs or crib gate, whatever you want to
13 describe that particular wall of the crib.

14 Q Tell the jury what he told you that amounted to a
15 confession?

16 A Baby's leg was there. He still picked her up--
17 there's enough, he just picked her up with enough force
18 knowing the leg was still stuck there, it rattled whole baby
19 crib, which possibly resulted in that injury.

20 Q Did he tell you that it resulted in an injury?

21 A Yes, look here in the confession see what his
22 exact words were.

23 Q Wait a minute you're telling the jury that he told
24 you that he picked the child up from the crib with such force
25 that it rocked the crib?

A-171

1 A That's correct.

2 Q And what injury did that result in?

3 A A leg injury.

4 Q Did you ask him about whether she cried or whether
5 her mother was or was anybody there? Now this is a
6 confession of a serious crime; is it not?

7 A Yes, it is.

8 Q You bet. And did you ask him who was there at the
9 time?

10 A Yes.

11 Q Can you answer that, officer?

12 A Yes, he was only--

13 Q What did he say?

14 A He was only person in the room with the child.

15 All the other people were in the house, Lori Moore--

16 Q Did you ask him if the child cried?

17 A Yes.

18 Q What did he say?

19 A It cried.

20 Q The child cried?

21 A Right.

22 Q Did you ask him if he told the child's mother?

23 A He said they talked after a custody hearing back
24 in February 26th of the same year about what may have caused
25 one of the leg injuries. Now since there's so many leg

A-172

1 injuries I'm not sure which one it related to, but I believe
2 it related to this one.

5 3 Q This is what you termed to be a confession of a
4 serious crime. Did you ask him when it happened?

5 A Yes.

6 6 Q Did you ask him when it happened?

7 A Yes.

7 8 Q What did he say?

9 A I don't believe he had a specific time frame in
10 which it happened other than when he lived with Lori Moore at
11 her sister's house.

8 12 Q Where?

13 A Let me check my notes.

14 Q Sure. Those notes that you're looking at are
15 Trooper Dawson's statements, questioning is that what you're
16 looking at?

17 A No, it would have been probably September of '96
18 time frame.

0 19 Q What's time frame?

20 A September of '96.

1 21 Q You were telling me where this was suppose to have
22 happened?

23 A I said Lori Moore's sister's house.

2 24 Q Which is where?

25 A Roulette.

A-173

Q Roulette. I want you to be sure of this.

A It's not Roulette. It would have happened in probably better in Lori's house.

Q Wait a minute this is the criminal conduct that he's confessing to and you are aware, are you not, that you have to file a criminal complaint in the county in the township where it occurred; are you not?

A Most definitely. I did not file that.

Q So that would be an important question where it occurred, right?

A Exactly. Coudersport.

Q First you said Roulette then you said Coudersport?

A Coudersport. There's lots of notes here.

Q Now, that is relation to him picking the child up out of the crib. It happened in September, in September of '96 in Coudersport, right?

A Roughly, yes.

Q Now, was there anybody else around when he took the child out of the baby holder in the Carr?

A The car seat.

Q Yeah.

A I believe there was. Let me check my notes.

Q Sure you check your notes.

A He mentioned Jennifer.

Q Who is Jennifer? Did you ask him who Jennifer

A-174

1 was?

2 A I believe that was asked or was actually known
3 prior to that by Trooper Dawson.

4 Q When did this take place?

5 A That would have been 12/96.

6 Q Where did it take place?

7 A Coudersport.

8 MR. LEBER: Judge, I think I'm going to make
9 an objection on several levels here. One, is that this
10 officer obviously is not the investigating officer in this
11 case. The examination is exceeding the scope of the direct
12 examination at this point. We have indicated that in the
13 opening statement to the jury we would produce the tape
14 recorded statement, which is the best evidence of what
15 occurred on that particular occasion and just appears to me
16 we're going over same ground here continually, that it's
17 repetitious and that there is nothing being accomplished here
18 and we should move onto other areas that's consistent with
19 the direct testimony that's been presented.

20 THE COURT: I think we have a certain amount
21 of repetition, however, certainly counsel is entitled to test
22 officer's recollection if that's in fact what we're testing.

23 MR. FINK: Why, yes, Your Honor.

24 MR. LEBER: We're not doing that. If the
25 officer is, Your Honor, reading off of this statement.

A-175

1 THE COURT: That's a concern I have.

2 MR. FINK: Me too, Your Honor, the question
3 is what the witness told him. He has said the witness has
4 told him exactly the same thing.

5 THE COURT: That is basis for my ruling you
6 may question the witness about matters within his own
7 recollection.

4 8 Q Did my client tell you where this took place, the
9 Carr incident?

10 A At Coudersport, Tammy's house.

5 11 Q But didn't tell you when?

12 A Probably did and the best way to answer my
13 particular job is to find out if a person is telling the
14 truth or not. Once I established that there was a problem
15 and person is being deceptive, slash lying I assist the
16 investigator where to go with his interviews, which after he
17 gave me the rough idea of the injuries to the child, what
18 probably caused those injuries, that is Trooper Dawson's job,
19 that's the reason why I have taped statement by him. If
20 Trooper Dawson was not there nor had anybody else, I would
21 have had fully documented notes, everything written down
22 because then it would be my particular case to testify on.

6 23 Q Do you understand that whole line of questioning
24 has to do with your testimony of what my client told you; do
25 you understand that?

A-176

1 A Yes.

2 Q And you have thus far answered what my client has
3 told you by reading the statement of what he told Trooper
4 Dawson; is that true?

5 A Yes, I tried to answer your questions, but my
6 answers are ambiguous when you ask specifics, therefore, I'll
7 have to consult the notes of the taped statement.

8 Q Did he confess to any other incidents of abuse?

9 A Just rib injuries and the leg injuries.

10 Q The ribs?

11 A Yes.

12 Q And the ankle on September in September; is that
13 right?

14 A Sometime in the Fall of '96.

15 Q He didn't say when?

16 A I don't believe he gave specific dates and times
17 exactly.

18 Q Well, did you ask him? This is serious crime he's
19 confessing to. Did you ask him about the specific time and
20 date?

21 A I believe we went over it.

22 Q What did he say?

23 A I do not recall exact dates and times that is
24 reason why we have Trooper Dawson to get the taped statement.

25 MR. FINK: Nothing further.

A-177

1 THE COURT: Any redirect?

2
3 REDIRECT EXAMINATION BY MR. LEBER:

4 Q So that I understand this, Trooper Davis, you were
5 in a separate room with Mr. Bailey; is that correct?

6 A That is correct.

7 Q And your purpose in being there was what?

8 A To polygraph the examinee, which would be Mr.
9 Bailey.

10 Q While you were preparing for that polygraph
11 examination Mr. Bailey made certain statements to you; is
12 that correct?

13 A That is correct.

14 Q After he made those statements what did you do?

15 A I got Trooper Dawson.

16 Q And you mentioned that there was a tape recorded
17 statement taken?

18 A Yes.

19 Q Were you present through out the taking of that
20 tape recorded statement?

21 A Yes.

22 Q Now, when you first got on the stand why didn't
23 you tell the jury whenever I first asked you questioning
24 about being here for a polygraph exam?

25 A Because he was never given a polygraph exam.

A-178

1 Q Is there a legal reason why you don't discuss
2 polygraphs in court?

3 A Not to hinder perhaps the jury's decision, but the
4 Court does recognize polygraph and there are Commonwealth
5 decisions on that especially one where confessions are given.

6 Q Now, again were you the investigating officer in
7 this case?

8 A No.

9 Q Who was the investigating officer?

10 A Trooper Dawson.

11 Q If you were the investigating officer in terms of
12 preparing notes of this particular interview, would you have
13 conducted yourself differently?

14 A Yeah.

15 MR. FINK: Objection irrelevant what he would
16 have done as investigating officer.

17 THE COURT: In view of the nature of the
18 cross overruled.

19 A Exactly. If I was the investigator, I would have
20 handled it lot more different, but since Trooper Dawson, it's
21 his case and he was available I let him proceed because he's
22 the one most likely going to have to testify more so than
23 myself.

24 MR. LEBER: Thank you, Trooper Davis.

25 THE COURT: Recross?

A-179

1 MR. FINK: No, Your Honor, thank you very
2 much.

3 MR. LEBER: Call Alan Moore to the stand.
4

5 A L A N M O O R E, having been duly sworn, was examined and
6 testified as follows:
7

8 DIRECT EXAMINATION BY MR. LEBER:

5 9 Q Alan, can you tell me your name and your address.

10 A I can't remember my address.

6 11 Q You don't know your address. How about your name,
12 full name?

13 A Alan Moore.

14 Q How old are you, Alan?

15 A Eight, I mean nine.

8 16 Q When is your birth date?

17 A December 15th.

9 18 Q That was yesterday; wasn't it?

19 A Hm-hmm.

0 20 Q Happy birthday. So you're nine now; is that
21 correct?

22 A Yeah.

1 23 Q You go to school?

24 A Yeah.

2 25 Q What school do you go to?

A-180

1 A Elementary school.

2 Q Where is that? Coudersport?

3 A Coudersport.

4 Q And what's your mother's name?

5 A Lori.

6 Q And do you live with your mom?

7 A No.

8 Q You live with your aunt?

9 A Yeah.

10 Q What's her name?

11 A Tammy.

12 Q She lives here in Coudersport; is that right?

13 A Yeah.

14 Q Did you used to live with your mom?

15 A Yes.

16 Q And do you remember back in the period of time
17 after your sister Rebecca was born?

18 A Yeah.

19 Q Do you remember where you lived at the time?

20 THE COURT: Could I have counsel step up here
21 a moment.

22 (Off-the-record discussion held).

23 MR. LEBER:

24 Q Again Rebecca is your sister, right?

25 A Yeah.

A-181

3 1 Q How old is Rebecca?

2 A One.

4 3 Q Okay and whenever she was really little where did
4 you live at first? Do you remember?

5 A No.

5 6 Q Okay. And whenever Rebecca was little and you were
7 about 7 years old was there somebody else that lived with you
8 and your mom and Rebecca. I guess you have another sister,
9 Jennifer; is that correct?

10 A Yeah.

6 11 Q Was there somebody else that lived with you then?

12 A Yeah.

7 13 Q Who was that?

14 A Mark.

8 15 Q Mark Bailey?

16 A Yeah.

9 17 Q He's the guy seated over there; is that correct?

18 A Yeah.

0 19 Q And was there a time when you saw something happen
20 between Mark and Rebecca that upset you?

21 A Yeah.

1 22 Q Do you know where did that happen?

23 A Roulette.

2 24 Q In Roulette. Where did you live at the time that
25 happened?

A-182

1 A Roulette.

2 Q You lived in Roulette then?

3 A Hm-hmm.

4 Q Who all lived with you in Roulette at that time,
5 Alan?

6 A My mom, my Uncle Mike and Jennifer and Rebecca and
7 Mark.

8 Q So your Uncle Mike, your mom, Jennifer, Rebecca
9 and Mark. Again Mark is Mark Bailey; is that correct?

10 A Yeah.

11 Q And what was it that happened? What did you see
12 happen that caused you to be upset?

13 A Mark like was in one of his mad attitudes, and he
14 like yanked Rebecca out of the car seat.

15 Q What happened, Alan, whenever Mark ripped, as you
16 said, Rebecca out of the car seat?

17 A She started crying.

18 Q And how long did she cry?

19 A I don't know.

20 Q You don't know. Did you see anything that
21 happened to Rebecca because of that, anything that happened
22 to her leg?

23 A It got stuck.

24 Q It got stuck. And after she was unstuck and after
25 she got out of the Carr or Mark took her out of the car, did

A-183

1 you see her leg after that?

2 A No, because I was still in the Carr.

1 3 Q You were still in the Carr.

2 4 Q Did you go into the house then?

5 A Yeah.

3 6 Q And after that did you see Rebecca's leg?

7 A No, because I went to bed.

4 8 Q You went to bed.

5 9 Q Okay. How about the next day or so did you see
10 Rebecca's leg?

11 A No, because I had to go to school next day.

6 12 Q You had to go to school next day. Do you remember
13 a time when Dr. Supinski testified that Rebecca had a cast on
14 her foot. Do you know what a cast is?

15 A Yeah.

7 16 Q Do you remember when she had a cast on her foot?

17 A Yeah.

8 18 Q And how long before she had a cast on her foot did
19 this happen that you saw Mark pull her out of the car seat?

20 A I don't remember.

9 21 Q You don't remember.

0 22 Q But you lived in Roulette at that time; is that
23 correct?

24 A Yeah.

25 MR. LEBER: Thanks a lot, Alan, I appreciate

A-184

1 it.

2 THE COURT: Thank you. Defense may cross.

3 MR. FINK: Just a couple questions of this
4 young man.

5 CROSS-EXAMINATION BY MR. FINK:

1 6 Q Alan, I'm H. B. Good to meet you. I ain't gonna
7 bite, honest. Do you know this fellow here?

8 A Yeah.

2 9 Q Is he a good guy?

10 A I don't know.

3 11 Q Do you get along good with him?

12 A Sort of.

4 13 Q How about your sister? She get along good with
14 him? How about your mom?

15 A I don't know.

5 16 Q You don't know. Okay. Just a couple more
17 questions. You were in a conversation, you were talking to
18 the D.A., the District Attorney, Mr. Leber, in the back of
19 this courtroom, right?

20 A Yeah.

6 21 Q Today?

22 A Yeah.

7 23 Q Were you talking over what you'd say here?

24 A Yeah.

25 MR. FINK: Alan, thanks so much. I have

A-185

1 nothing further thanks.

2 MR. LEBER: Just one other question, Alan.

8 3 Q When you and I talked when we were back there in
4 the back of the courtroom what did I tell you about the way
5 that I wanted you to testify? Do you remember?

6 A No.

9 7 Q What did I tell you I wanted you to tell the jury?

8 A The truth.

0 9 Q The truth. Thank you.

10 MR. LEBER: I have nothing else, Alan.

11 THE COURT: Anything on recross?

12 MR. FINK: No, Your Honor.

13 THE COURT: Thank you very much for coming in
14 today. You can step down now.

15 MR. LEBER: Lori Moore, please.

16

17 L O R I M O O R E, having been duly sworn, was examined and
18 testified as follows:

19

20 DIRECT EXAMINATION BY MR. LEBER:

1 21 Q Would you tell us your name and address please?

22 A Lori Moore, and my address is P.O. Box 264,
23 Coudersport.

2 24 Q And how old are you, Miss Moore?

25 A 27.

A-186

Q Do you have children?

A Yes.

Q How many children do you have?

A Four.

Q Their names and ages?

A I have Alan, he's nine, I have Anthony, he's 6, Jennifer is 2 and Rebecca she's 1.

Q Now, Rebecca was born when?

A February 2nd of '96.

Q And at the time when Rebecca was born where did you live?

A With my sister in Coudersport.

Q Her name is?

A Tammy Baker.

Q And at that time what was your relationship to the Defendant, Mark Bailey?

A He was my boyfriend.

Q And where did he reside at that time?

A I think at that time he was still staying with my sister and me.

Q And how long did he continue to stay with your sister and you?

A He moved back out I think in March.

Q And then after that did you and Mr. Bailey get together again?

A-187

1 A Yeah, we didn't split up. He just moved out of
2 there and back to Bradford. We stayed seeing each other. He
3 moved back into my sister's house in either May or June when
4 he started working over at Emporium Specialties.

5 Q And how long did you continue to live at your
6 sister's house along with Mr. Bailey?

7 A Up until September.

8 Q That's September of 1996; is that correct?

9 A Yes.

10 Q And where did you go from your sister's house?
11 Where did you move to?

12 A Roulette.

13 Q And what was the address in Roulette?

14 A P.O. Box 81, Roulette.

15 Q And who all lived with you in Roulette?

16 A Me, and Mark and Alan and Jennifer, Rebecca and my
17 brother Mike.

18 Q How long did you stay together with Mr. Bailey
19 after you moved to Roulette?

20 A We were together until he went to jail and then we
21 broke up, and then after he got out of jail we got back
22 together for a while.

23 Q And how long after you got back together did you
24 and Mr. Bailey continue to be together?

25 A Until October of this year.

A-188

Q And since then you've been separated from him; is that correct?

A Yes.

Q Now, who was the pediatrician, the doctor who took care of Rebecca?

A Dr. Asar.

Q And did you take Rebecca to see Dr. Asar for regular visits?

A Yes.

Q Now, on September 24th of 1996 did you have occasion to see Dr. Asar on that date?

A No, I just took her into her office because she had a swollen leg.

Q The question was did you see Dr. Asar on that date?

A Yes.

Q Where was it that you saw her?

A At her office.

Q And after seeing Dr. Asar what did you do?

A She gave me some papers to take Rebecca to the hospital to have her leg x-rayed so I took her to the hospital.

Q Why was it that you went to see Dr. Asar on that day?

A Because Rebecca's leg was swollen. It had, like

A-189

1 it was black and blue and it kind of looked funny.

2 Q What do you mean it looked funny?

3 A It was, looked like it was kind of crooked.

9 4 Q And when did you first notice that her leg was
5 kind of crooked and swollen?

6 A It was probably--my sister pointed it out to me
7 probably like the Saturday before I took her.

8 Q Do you know what day of the week it was that you
9 took Rebecca to Dr. Asar's office and then to the hospital?

10 A I do believe it was on a Monday.

11 Q When you went to see Dr. Asar on that date did
12 anybody go with you?

13 A Yes, Mark did.

14 Q And Mark is the defendant here?

15 A That is correct, yes.

3 16 Q And who did you see when you went to the hospital?

17 A I really don't remember who I seen.

4 18 Q Any of the doctors who have testified here today?

19 A I remember seeing Dr. Supinski there, but that was
20 at the end. The rest of them I don't remember.

5 21 Q Do you remember anyone else here in the courtroom
22 was present in the Emergency Room when you were there that
23 day?

24 A I don't.

6 25 Q Do you remember Mrs. Carr here, the lady seated

A - 190

1 right behind me?

2 A Yeah, I think she was in the room with us when
3 just before they put the cast on and while they were doing
4 the cast.

5 Q Now, during the time that you were at the
6 Emergency Room and you met with Dr. Supinski did Dr. Supinski
7 basically explain to you as he testified today of what his
8 findings were?

9 A Yes.

10 Q Did you give any explanation to Dr. Supinski at
11 that time or to anyone else as to what happened to the child?

12 A Yes, I told him that I thought maybe it was
13 because my daughter had fallen on her because she was sitting
14 in a car seat. She had her leg draped over the car seat and
15 my older daughter fell on her leg while it was draped over
16 the car seat.

17 Q How old was your older daughter at that time
18 approximately?

19 A She was little over a year old.

20 Q Now, was Mr. Bailey, the defendant, was he present
21 with you in the emergency room throughout this entire period
22 of time?

23 A Yes.

24 Q And did he offer any explanation as to what had
25 happened to this child?

A-191

1 A I don't remember.

2 Q Whenever you were told by Dr. Supinski of what his
3 findings were relative to this case can you tell us how Mr.
4 Bailey reacted to that news?

5 A He was upset and he cried.

6 Q Did he have anything to say at that point?

7 A Just basically that he couldn't believe that it
8 happened and he wanted to know how it happened.

9 Q And did he say anything relative to who did it and
10 what he thought of that?

11 A Not that I can remember.

12 Q Now, what happened then with Rebecca after you
13 were done with Dr. Supinski?

14 A Children and Youth Services took her into their
15 custody.

16 Q And how long did she remain in Children Youth
17 Services custody?

18 A She's still in their custody.

19 Q Since that date of September 24th, 1996 have you
20 had continuing contact with Rebecca?

21 A Yes.

22 Q How frequently do you see her?

23 A At first it was like every other weekend, but now
24 we see her every weekend.

25 Q Can you tell us whether or not there have been any

A-192

1 injuries which have occurred to Rebecca since September 24th,
2 1996?

3 A Not that I'm aware of.

4 Q Now, in February of 1997, I believe February 28th
5 of 1997, did you have occasion to go to the Pennsylvania
6 State Police Barracks with Mr. Bailey?

7 A Yes.

8 Q And after you were at the Pennsylvania State
9 Police Barracks with Mr. Bailey did he make any statements to
10 you relative to what he had told the officers at that time?

11 A He had told me that he had told them that he did
12 it and I asked him--

13 Q That he what?

14 A That he had possibly done that to Rebecca, and I
15 asked him why. And he said that he couldn't handle her
16 crying and that Rebecca reminded him of his son.

17 Q What was the problem with his son?

18 A He wasn't able to see his son.

19 Q What, if anything, did Mr. Bailey tell you more
20 specifically as to how he might possibly hurt Rebecca?

21 A I don't remember.

22 Q You don't remember?

23 A I can't recall right now.

24 Q Now, Mrs. Moore, are you currently employed?

25 A Yes.

A-193

Q Where are you employed?

A Emporium Specialties over in Austin.

MR. LEBER: Nothing else of Mrs. Moore thank you.

THE COURT: Counsel may cross.

CROSS-EXAMINATION BY MR. FINK:

Q Lori, good afternoon to you. Long day. Lori, when was it that you and my client first started to live together in relation to the birth of Rebecca? I'll put it that way.

A He was staying with me and my sister when I had Rebecca.

Q Stop right there. Now you and your sister was she older or younger sister?

A Older.

Q You, your sister, my client and were there any children living in the house at that time?

A Yes, my son Alan, my daughter Jennifer and my sister's daughter.

Q Three others were living in the house and where was that?

A In Coudersport.

Q Coudersport?

A Yeah.

Q Okay. Whose house? Who was the chief renter or

A-194

1 who would you say was the head of the house so to speak?

2 A My sister.

4 3 Q I'm sorry?

4 A My sister.

5 5 Q There were two sisters?

6 A No, only one sister.

6 7 Q Sorry okay. Now, Rebecca--my client did not father
8 Rebecca; is that true?

9 A That's true.

7 10 Q After Rebecca's birth--and incidentally was
11 Rebecca born up at Charles Cole here in Coudersport?

12 A Yes.

8 13 Q And that was in February of 1996?

14 A Yes.

9 15 Q How did my client act toward Rebecca after she
16 came home from the hospital?

17 A He held her, he played with her. I mean not much
18 more than anybody else. She was just a new born baby. All
19 she did was sleep. So there wasn't whole lot of time spent
20 with her, but I mean when I wasn't holding her or would
21 actually let somebody else hold her he held her and feed her
22 and stuff like that.

0 23 Q Who was considered primary caretaker of Rebecca up
24 to the time that you and my client split up?

25 A I was.

A-195

1 Q You were. Okay. Did there come a time when you
2 moved from your sister's house in Coudersport?

3 A Yes.

4 Q Where did you go?

5 A To Roulette.

6 Q And when was that?

7 A In September.

8 Q Do you know what date?

9 A I do believe it was around 10th.

10 Q I'm sorry?

11 A It was around the 10th of September.

12 Q Around the tenth?

13 A Hm-hmm.

14 Q 10th of September okay. Now, up to that time, to
15 the time you moved from Coudersport to Roulette could you
16 describe, and as Rebecca got a little older did my client
17 continue to play with her and did he get along well with her?

18 A When he was there. He wasn't there all the time.
19 He was working. He'd get frustrated sometimes when she'd
20 cry.

21 Q Up to September 10th of 1996 when you moved to
22 Roulette were you aware of any physical injuries to Rebecca?

23 A No, I was not.

24 Q How often did you bathe her?

25 A Every day.

A-196

Q You would give her a bath, and I assume you would--she was bare naked when you did that?

A Yeah.

Q And you were never aware of any injury or was there any?

A There was one time that her foot was swollen and black and blue.

Q Let's talk about that now. Her foot was caught where?

A It wasn't caught any where. It was swollen and black and blue.

Q Okay let's talk about that. Which foot was that?

A I don't recall.

Q Okay. Do you know when it was in relation to when you moved from Coudersport to Roulette?

A I know it was when I was still in Coudersport, but I don't know how long.

Q Do you have any idea how that came about that her foot was black and blue?

A No, I don't.

Q Were you ever aware that Mark was ever alone with Rebecca?

A I don't ever remember Mark being alone with Rebecca except for like if he'd get up with her middle of the night or something like that. There was always somebody in

A-197

1 the house.

2 Q Do you remember whether Rebecca complained as
3 babies complain like crying or whining concerning her
4 apparent injuries to her foot before you moved to Roulette?

5 A There was one time at my sisters when we changed
6 her diaper she would cry a lot and we thought she had a
7 dislocated hip, and I talked to Dr. Asar about it, which
8 means she had a physical, and Dr. Asar said there was nothing
9 wrong with her, there was nothing wrong with her hip, there
10 was nothing wrong with her.

8 11 Q That was specific reference to this black and blue
12 Mark that you observed?

13 A No, this was a different time.

14 Q Now, what I'm trying to focus in on right now is
15 the black and blue mark you found on her foot. You don't
16 know which one before you moved from Coudersport to Roulette,
17 and I guess I've asked you was there any evidence or does she
18 show you in any way that a baby can show a mother that that
19 hurt her?

20 A If you touched it, she would really.

0 21 Q Did you take her to the doctor because of that?

22 A No, I did not.

1 23 Q You did not?

24 A No.

2 25 Q And did the doctor ever observe it?

A-198

1 A I don't recall if she did or not.

2 Q Do you know whether the doctor gave her a physical
3 after you saw it?

4 A She been to the doctor after.

5 Q And by the doctor we're talking about the doctor
6 that had cared for her since a week after her birth; right?

7 A Right.

8 Q Up to right now?

9 A Right.

10 Q Were you ever aware of Rebecca having difficulty
11 in breathing or any rib injury that she may have had?

12 A No, she had a small bruise on her ribs at one
13 point in time.

14 Q On her?

15 A Her one rib at one point in time, but it was
16 nothing that I would have been worried about. It was just a
17 small--

18 Q Did she evidence any pain in reference to any rib
19 that you know of?

20 A I don't recall.

21 Q Now, other than the black and blue foot that
22 didn't give you cause for--you were not concerned about that,
23 I gather, is that true?

24 A I was, but the reason I didn't take her to the
25 hospital for that is because my daughter, Jennifer, had been

A-199

1 there several times for the same symptoms, and every time I
2 took her to the doctor Dr. Asar would always tell me there
3 was nothing wrong with her, that she didn't know what was
4 causing her feet to swell and turn black and blue.

0 5 Q Would you say those symptoms ran in the family?

6 A I have no idea, not that I know of.

1 7 Q You're older daughter had the same symptoms; is
8 that right?

9 A Yeah, she would get swollen feet and they would
10 turn black and blue. She would--also her ears would swell up
11 and turn black and blue.

2 12 Q Really?

13 A Yes.

3 14 Q And the doctor would say there was nothing wrong?

15 A She gave me several different answers as to why
16 they were doing it, from dry skin to whatever.

4 17 Q Now, let's go up to September 24. You had lived
18 in Roulette for a couple of weeks?

19 A Yes.

5 20 Q Who lived with you then?

21 A Me, Mark, and Alan, Jennifer, Rebecca and my
22 brother Mike.

6 23 Q Who?

24 A My brother Mike.

7 25 Q Your brother Mike, that's six of you, I guess?

A-200

1 A Yeah.

2 Q Did there come a point in time when it came to
3 your attention that Rebecca had another swollen and
4 discolored foot or ankle?

5 A It was more up in her lower leg area that was
6 swollen and discolored.

7 Q What area?

8 A Lower leg like in her shin area up in there. It
9 wasn't her foot or her ankle it was more like her shin.

10 Q When you talk about shin, you're talking of the
11 area half way between the knee and the ankle?

12 A Yeah.

13 Q Front or back or both?

14 A Both.

15 Q And when you first observed anything in that area
16 tell the jury what you saw?

17 A It was black and blue. It was swollen.

18 Q Now, you didn't take her to the hospital right
19 away, right?

20 A No.

21 Q But did you keep an eye on it so to speak?

22 A Yeah.

23 Q It kept getting worse?

24 A Yeah, I took her to the hospital finally because
25 her leg looked crooked to me. It looked like it was out of

A-201

1 place or something.

2 Q And how bad was it swollen at that time?

3 A The swelling wasn't really bad at that time. It
4 wasn't as bad as it had been, it had went down.

5 Q It had been almost double its size; hadn't it?

6 A Probably.

7 Q The swelling went down but you asked to have it
8 checked out any way?

9 A Yes.

10 Q Now, when you first noticed or just before you
11 first noticed it were you aware that there was any traumatic
12 event to Rebecca, that is somebody may have jumped on her or
13 something like that?

14 A Only thing I knew about was my daughter, Jennifer,
15 falling on her while she was sitting in her car seat.

16 Q Your daughter Jennifer. Your daughter Jennifer is
17 about two years old and about 30 pounds?

18 A She was--she wasn't two years old, she's only two
19 now, but she was heavy for her age. I don't recall how much
20 she weighed or anything.

21 Q Now, what event did you observe in reference to
22 your daughter Jennifer and little Rebecca?

23 A Jennifer had fallen on Rebecca's leg while she was
24 sitting in the car seat. Her leg was like this in the car
25 seat. Her leg was draped over the car seat like this. She

A-202

1 was sitting in the car seat playing with her toys, Jennifer
2 fell and when she did she went onto her leg.

2 3 Q You've indicated that with your right arm and hand
4 that respresenting Rebecca's leg that her leg was kind of
5 draped over the car seat and that your daughter, Jennifer,
6 fell basically on her ankle so that it was a downward thrust
7 at her ankle, I guess. Was that a fair statement of what
8 happened?

9 A I would suppose.

3 10 Q Okay did you see this happen?

11 A Yes.

4 12 Q Did Rebecca cry?

13 A Yeah, for a few minutes, but after I picked her up
14 and usually babies calm down after they're picked up, she
15 did, so I didn't really.

5 16 Q Do you remember whether or not that night you
17 noticed any swelling or discoloration of the shin?

18 A I don't remember seeing it.

6 19 Q That's the event about which you told Dr.
20 Supinski?

21 A Yes.

7 22 Q And do you believe as you sit there right now that
23 that's what caused the injury evidenced by the swelling of
24 September 24th?

25 A I honestly couldn't tell you, I'm not a doctor, I

A-203

1 don't know if that's what caused it or not.

2 Q You're a mother and you were there?

3 MR. LEBER: Your Honor, I think she's
4 answered.

5 THE COURT: Witness has I believe indicated
6 she can't say.

7 Q Did you ever see Mark do anything to Rebecca to
8 injure her?

9 A I never seen him, no.

10 Q Even though Mark was not the father of Rebecca did
11 it appear to you that Mark loved Rebecca?

12 A He always seemed to do good with all my kids.

13 Q Was Rebecca staying for a time with your sister?
14 After the Children Youth Services hearing, Rebecca was taken
15 from you; is that true?

16 A Yes.

17 Q Did she live with your sister for some time?

18 A After she was taken from me.

19 Q Yeah.

20 A No.

21 Q Her father?

22 A Yeah, she was living--she didn't live with her
23 father. She was in a foster home.

24 Q Did she live with her father at any time?

25 A For a little while just recently.

A-204

6. 1 Q Did it come to your attention that the father's
2 wife was abusing Rebecca?

3 MR. LEBER: Objection, Your Honor.

4 THE COURT: Would counsel approach.

5 (Off-the-record discussion held).

6 THE COURT: The objection is sustained jury
7 will disregard that remark in its entirety.

7 8 Q Do you know whether or not prior to September 24,
9 that child ever stayed there or saw, Rebecca ever stayed or
10 saw her father?

11 A No, she did not.

8 12 Q Would you say that Rebecca was a happy baby?

13 A Yeah, most times she was. She'd have her times
14 when she was cranky.

9 15 Q You have stated somewhere, have you not, that you
16 didn't go any place without Rebecca, Rebecca was your baby
17 and you didn't go any place without her; isn't that true?

18 A Pretty basically. There might have been a couple
19 times she went to a baby sister.

0 20 Q Where was that?

21 A The baby sister, usually my sister.

22 MR. FINK: I have no other questions.

23 THE COURT: Anything else?

24 MR. LEBER: Redirect, yes.

25

A-205

1 REDIRECT EXAMINATION BY MR. LEBER:

2 Q Miss Moore, Mr. Fink asked you about Mr. Bailey's
3 relationship with your children and you said that he always
4 seemed to do good with all my kids. How did the kids react
5 to Mr. Bailey?

6 A When I first got with him, they were okay with
7 him, but towards the end Jennifer was afraid of him. And
8 Alan, I don't believe, I don't really know, he just kind of
9 didn't say much, but Jennifer was afraid of him.

2 10 Q You several times said that Alan, that Mark was
11 never alone, then you qualified that by saying there was
12 always someone in the house. Even though somebody was in the
13 house were there ever times when Mark, for instance, would
14 have been in a different room with Rebecca alone?

15 A Yes, several times.

3 16 Q And you heard your son Alan's testimony here
17 today; is that correct?

18 A Yes.

4 19 Q Do you recall the incident of which he describes?

20 A I do vaguely. I remember that Mark and I had been
21 fighting that day, and I had taken Jennifer into the house,
22 and he was getting Rebecca out and Alan of course was
23 following, but I had already went to the house.

5 24 Q So Mark was alone with the baby at that time other
25 than for Alan; is that correct?

A-206

1 A Yeah.

2 Q And you indicated that you and Mark were arguing;
3 is that correct?

4 A Yeah.

5 Q And when in relationship to when you arrived home
6 had you been arguing?

7 A I don't know.

8 Q How would you describe Mr. Bailey's demeanor, his
9 conduct at that particular time?

10 A I honestly can't recall.

11 Q Now, when you talked about the one time that
12 Rebecca had a black and blue foot you indicated that occurred
13 in Coudersport; is that correct?

14 A Yes.

15 Q And is that a separate incident from the incident
16 that took you to the hospital on September 24th; is that
17 correct?

18 A Yes.

19 Q Now you also talked about problems you had, that
20 you had taken Rebecca to Dr. Asar because she would cry
21 whenever you were changing her diapers?

22 A Yeah.

23 Q Tell us what you would do that would cause Rebecca
24 to cry?

25 A Just the normal lifting of her legs to pull her up

A-207

1 to change her diaper would make her cry, and if you like bent
2 her leg or something she would cry.

3 Q And how long after you observed that was it that
4 you finally got Rebecca to Dr. Asar's office?

5 A It was shortly after I noticed it because my
6 sister said, told me that it might be a dislocated hip. So I
7 had taken her to the hospital to make sure, to Dr. Asar's to
8 make sure it wasn't a dislocated hip.

4 9 Q Shortly after being how many days?

10 A I don't remember. It was whenever I could get an
11 appointment to get in.

5 12 Q Then you talked about an incident where it was
13 swollen in the area of her shin and it was black and blue.
14 Was that incident separate from the incident that caused you
15 to go to the hospital on September 24th?

16 A That was when I went to the hospital on the 24th.

6 17 Q And the times that you said that Mark might have
18 been with Rebecca alone in other parts of the house did you
19 ever hear Rebecca respond in any way whenever Mark was with
20 her that caused you concern?

21 A She would always--she didn't really seem to like
22 Mark a whole lot. She always pretty much cried a lot when he
23 was around, but usually he'd go in like when she'd wake up at
24 night and give her a bottle. After he gave her a bottle,
25 she'd calm down and go to sleep.

A-208

7 1 Q You testified that Mark got frustrated whenever
2 the baby cried. How would Mark act whenever the baby cried?

3 A He'd sometimes yell.

8 4 Q Yell at who?

5 A The kids.

9 6 Q Would he yell at Rebecca?

7 A I'm not sure if I ever heard him yell at Rebecca
8 or not.

0 9 Q When you say the kids you mean Alan and Jennifer?

10 A Yeah.

1 11 Q Again, at that time Jennifer would have been
12 approximately how old?

13 A About a year and a half maybe.

14 Q You mentioned that Jennifer had had similar signs
15 or symptoms relative to her feet as you observed on Rebecca
16 and that she also had injuries to her ears. When was that in
17 relationship to when you and Mark lived together?

18 A I can't remember when the bruising on Jennifer
19 started. It was like when she was probably ten or eleven
20 months old and I started seeing him. I don't remember how
21 old she was. I started seeing him in July. She was born in
22 February so.

3 23 Q You started seeing him in July of '95, would that
24 be correct?

25 A Yes.

A-209

4 1 Q And she was born in February of '95; is that
2 correct?

3 A Yes.

5 4 Q And these started appearing when she was ten or
5 eleven months old?

6 A (Indicating yes).

7 MR. LEBER: Nothing else, thank you.

8 THE COURT: Any further questions for this
9 witness?

10 MR. FINK: Just additional line, Your Honor.
11 I'm not so sure it's proper recross, but with the Courts
12 indulgence.

13

14 RECROSS EXAMINATION BY MR. FINK:

6 15 Q When you took Rebecca to the hospital on September
16 24, did you notice any marks on her face?

17 A Yeah, she had a bruise like on her, I think it was
18 on her cheek.

7 19 Q Burn?

20 A A bruise.

8 21 Q A bruise. Do you know how that occurred?

22 A She had hit her face in the crib on the bars of
23 the crib because I had taken the bumper pad out of her crib.

24 MR. FINK: Thank you very much.

25 THE COURT: Thank you. You may step down.

A-210

1 Any brief witnesses that Commonwealth would care to call late
2 at the end of the day. I can call Mrs. Carr.

3

4 A L I C E C A R R, having been duly sworn, was examined and
5 testified as follows:

6

7 DIRECT EXAMINATION BY MR. LEBER:

9 8 Q Your name and address, please?

9 A My name is Alice D. Carr of Coudersport,
10 Pennsylvania.

0 11 Q What is your occupation?

12 A I'm a registered nurse. I'm working at Charles
13 Cole Hospital in the Emergency Room.

1 14 Q How long have you worked in the emergency room?

15 A Ten years.

2 16 Q How long have you been a nurse?

17 A Ten years.

3 18 Q And were you present at the emergency room on the
19 24th day of September 1996?

20 A Yes.

4 21 Q What was your role in the Emergency Room on that
22 date?

23 A I'm the 3 to 11 charge nurse and I had just come
24 on duty, and the sign off nurse had told me that there was a
25 child with a possible suspected child abuse in Room 2 that

A-211

1 hadn't been assessed yet and was waiting for Children and
2 Youth Services and Dr. Supinski to come up and see her.

5 3 Q Tell us what observations you made of this child
4 at the time when she was in the Emergency Room?

5 A I went into the room, introduced myself to the
6 mom, and at the time I thought it was the dad, and I did a
7 basic assessment on the child per our protocol in the
8 Emergency Room. I undressed the child, put on a little
9 hospital gown, took a heart beat, blood pressure, pulse,
10 temperature. Did a physical assessment where I noted she had
11 two bruises on her face, one on her forehead by her temple
12 and one underneath her left eye. They were yellow, sort of
13 fading. Further assessment indicated a small crooked right
14 ankle, foot area that had swelling and redness and bruising.

6 15 Q Incidentally, I didn't establish this. Who was
16 that child in the Emergency Room?

17 A Rebecca Moore.

7 18 Q And how old was she at that time?

19 A 7 months.

8 20 Q And who was with her in the emergency room?

21 A Her mother, Lori, and Mark Bailey.

9 22 Q And that's the defendant that's seated here; is
23 that correct?

24 A Yes.

0 25 Q You indicated that you observed yellow bruises.

A-212

1 Again, where did you observe them to be?

2 A On the left forehead close to the temple and the
3 left cheek underneath the eye.

1 4 Q And did either Mr. Bailey or Mrs., Miss Moore the
5 mother indicate to you what had happened?

6 A I had asked them specifically if they knew what
7 happened to the child, where she had gotten the bruises, and
8 Mrs. Moore said that Rebecca's 18 month-old sister had fallen
9 on her four to five days prior to her coming to the hospital.

2 10 Q You indicated that the bruise that you observed on
11 the foot was yellow and green?

12 A Right.

3 13 Q In your training what's significance of that?

14 A They're old, they're not as fresh as a one day
15 bruise. As they're fading, they turn from purple to green to
16 yellow until they fade away.

4 17 Q And again this was the 24th of September 1996?

18 A Yes.

5 19 Q Do you recall what day of the week that was?

20 A It was a Monday.

6 21 Q And they indicated that--this Mr. Bailey and Miss
22 Moore indicated to you that this incident occurred when?

23 A Four to five days prior to them coming in.

7 24 Q Now, did there come a point in time when it was
25 explained to Mr. Bailey and Miss Moore that this child would

A-213

1 be taken by Children and Youth Services?

2 A After I was, after I assessed the child and had
3 gone out of the room.

4 MR. FINK: I assume this is not responsive.
5 Requires a yes or no answer.

6 THE COURT: Witness should answer.

7 A Yes.

8 Q Go ahead, tell us what happened.

9 A After I done my assessment on the child, I went
10 back out to find further information because it was just a
11 brief description of what was going on. When I went into see
12 the child, I came out and I was told that Joy Glassmire--

13 MR. FINK: Objection hearsay and it's
14 irrelevant.

15 MR. LEBER: What you were told relative to
16 anything else you can't testify to.

17 MR. FINK: What's the question before the
18 witness?

19 THE COURT: There isn't one.

20 MR. LEBER: There was a while ago. Let's get
21 one.

22 Q How did Miss Moore react whenever told that the
23 child would be taken by Children Youth Services?

24 A She became very upset, started crying.

25 Q And how did Mr. Bailey react?

A-214

1 A He became upset and he started crying.

1 2 Q Do you recall anything that Mr. Bailey had to say
3 during the time that he was in the E R with you and this
4 child and Miss Moore?

5 A When I was in talking with the parents, we were
6 just basically chit chatting and talking about the kids and
7 because the mom had said that 18 month-old child had fallen
8 on top of her and hurt her leg and Mr. Bailey had said that
9 the kids were always playing around and falling on top of the
10 baby and stuff.

2 11 Q Was that his explanation for what had happened?

12 A Yes.

3 13 Q And at that point were you aware of the fact that
14 Dr. Supinski and Dr. Dallaire had determined that there were
15 four or five fractures all together?

16 MR. FINK: Objection irrelevant. Whether she
17 was aware or not has nothing to do with the case.

18 THE COURT: Overruled.

19 A Yes.

4 20 Q To the best of your recollection were Miss Moore
21 and Mr. Bailey aware of that at that time?

22 A Not until Dr. Supinski came in to speak with them.

5 23 Q That was after?

24 A Yes.

25 MR. LEBER: Nothing else, thank you.

A-215

1 THE COURT: Counsel may cross.

2

3 CROSS-EXAMINATION BY MR. FINK:

4

Q Dee, I have no questions.

5

MR. FINK: I'm sorry, I have no questions.

6

Thank you.

7

8

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10

THE COURT: Thank you very much. We've had a good long day. Now I got to speak to the attorneys one minute before I send you folks home, figure out what time we ought to start tomorrow. Counsel step up here.

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THE COURT: Ladies and gentlemen, after conferring with counsel I guess we're making reasonable progress on the case, and I'll ask you to be here a few minutes before 9:00. It is my intention that we will start at 9:00. During overnight recess, ladies and gentlemen, do not, repeat, do not discuss this case among yourselves or with anyone else including family and friends, fellow workers, make no effort to get any further information on this. Get a good night's rest. Come see us little before 9, and we will get to work. Thank you. Court will stands in recess until 9:00 tomorrow morning.

22

(Overnight recess).

23

24

25

THE COURT: Welcome back, ladies and gentlemen, today to apparently the last day of our trial. Nice to have you all back with us. As we start, I want to add

A-216

1 one caution to all the other instructions I've given you. I
2 do not know if there is any local media coverage of this
3 trial. If there is, I think best thing we will have you do is
4 avoid local various newspapers and avoid local radio station
5 because any information you get about the case, as I said
6 yesterday, needs to come as you're all together in the jury
7 box here in the courtroom, not from any other source. I want
8 to instruct you on the record to disregard all media reports
9 of these proceedings whether it's newspapers, radio or
10 whatever. Okay thank you. We'll note appearance of the
11 District Attorney and prosecuting officer for the
12 Commonwealth. Defense Counsel and Defendant are here we will
13 proceed. Commonwealth.

14 MR. LEBER: Thank you, Your Honor. Call Tammy
15 Baker to the stand please.

16
17 T A M M Y B A K E R, having been duly sworn, was examined
18 and testified as follows:

19
20 DIRECT EXAMINATION BY MR. LEBER:

7 21 Q Your name and address, please.

22 A Tammy Baker, Dorris Apartments, Number 10,
23 Coudersport.

8 24 Q What is your relationship to Lori Moore, the
25 mother of Rebecca Moore?

A-217

1 A I'm her sister.

2 Q And do you know Rebecca's date of birth?

3 A February 3rd, '96.

4 Q And are you employed, Mrs. Baker?

5 A I work for Adelphia.

6 Q Now, I want to go back to 1996 after the birth of
7 Rebecca Moore. Were you familiar with where Rebecca and
8 mother, Lori, resided?

9 A Yes.

10 Q Where did they reside at the time Rebecca was
11 born?

12 A When she was born, they lived with me.

13 Q That was here in Coudersport?

14 A Here in Coudersport.

15 Q And who else resided with you during the first few
16 months of Rebecca's life?

17 A My sister and her son, Alan, her daughter,
18 Jennifer, my daughter and my brother lived there off and on
19 and Michael.

20 Q And did there come a point in time when another
21 individual came to live with you?

22 A Yes, Mark Bailey also stayed there.

23 Q Mark Bailey is the defendant seated next to Mr.
24 Fink; is that correct?

25 A Yes.

A-218

1 Q When was it approximately when Mark Bailey began
2 to live with you in Coudersport?

3 A He stayed there before she had Rebecca for a
4 while. Then he left, and then he became employed at Emporium
5 Specialties and it was easier for him to get a ride from
6 Coudersport so he moved back in, I'm not really sure, I know
7 it was after he started working at Emporium Specialties.

8 Q Can you be approximate in telling us?

9 A I know it was end of school, beginning of summer.

10 Q Late May or June?

11 A Right.

12 Q Again that's 1996; is that correct?

13 A Yes.

14 Q How long did Mr. Bailey continue to live with you?

15 A He stayed there until him and Lori got an
16 apartment down in Roulette in September.

17 Q September of what year?

18 A '96.

19 Q And who all moved to that apartment in Roulette?

20 A Mark Bailey, Lori and her son, Alan, and her
21 daughter, Jennifer, and her daughter, Rebecca.

22 Q What about your brother Mike?

23 A He lived between here and there so both places.

24 Q Did there come a point in time when Rebecca was
25 residing with you, with her mother and other people that you

A-219

1 noticed that she was having problems?

2 A Yes, I had noticed that she had black and blue
3 foot. It wasn't really black like a bruise, it looked more
4 like--actually I don't how to describe, around the toe area
5 there it was brown dots, like blood vessel broken or
6 something like that. I don't know how to describe it really.

7 Q When approximately was that?

8 A I'm not really sure. I don't remember dates, I'm
9 not really sure.

10 Q Was it before or after Mark Bailey came to live
11 with you?

12 A It would have been after.

13 Q Any other problems that you noticed with Rebecca
14 of a physical nature?

15 A Not while she was there. I didn't take care of
16 Rebecca as much as I had the other kids. Lori took care of
17 her, bathed her, did that kind of stuff with her. I stepped
18 back, I helped take care of Jennifer a lot and Jennifer got
19 attached to me. I didn't want Rebecca to get attached
20 because I knew it made Lori a little upset when Jennifer got
21 attached to me.

22 Q Was your sister, Lori, working at the time when
23 she was living with you?

24 A I don't remember when she started working at
25 Emporium Specialties.

A-220

Q After Lori, Mr. Bailey, the children moved to Roulette did you continue to have contact with Rebecca?

A Yes, Lori used to, her and Mark used to bring her up either Friday or Saturdays on weekend and I'd keep her until Sunday afternoon.

Q On or about the weekend, I guess, it would have been 21st of September, did Lori and Mark bring Rebecca to stay with you?

A Yes.

Q Did you notice anything unusual with Rebecca?

A She told me when Lori brought her in, she told me Rebecca's leg was hurt.

MR. FINK: Objection.

THE COURT: Sustained as to those words.

Q You can't state what someone else said.

A I looked at Rebecca's leg, it was bruised in the ankle area.

Q Did you say anything to Lori and Mark at that time?

A I asked them if they, I asked Lori if she had taken her to the doctor and she told me, no, and I told her that I thought she should take her to the doctor.

Q And what was Rebecca like that weekend?

A She was okay as long as you didn't move her around a lot. If she got jolted a little bit, she'd cry because of

A-221

1 her leg hurting I assumed it was because of her leg hurting.
2 I had to be careful when diapering her and cleaning her
3 because she would cry real easy. The bruise looked really
4 bad so I assumed it was because her leg was hurting.

5 Q And how long did Rebecca stay with you that
6 weekend?

7 A She was there until Sunday afternoon.

8 Q Did you say anything more to Lori and Mr. Bailey
9 whenever they came to pick the child up?

10 A I told Lori that she, Rebecca seemed to be
11 uncomfortable with the leg and I was really worried about it.
12 I really thought she should take her up to the Emergency Room
13 or to the doctor and get it checked because I was really
14 concerned.

15 Q That was Sunday afternoon?

16 A Yes.

17 Q Did you see Rebecca between that Sunday afternoon
18 and the time when she was in fact taken to the doctors?

19 A I don't think so.

20 Q Tell us what you observed regarding the
21 relationship between Rebecca and Mr. Bailey?

22 A When they stayed at my house, he would play with
23 her like he had the other children. She seemed to be fine
24 with him. After they moved, especially that weekend that she
25 had come up with the broken leg Lori brought her in which was

A-222

1 unusual usually Mark was the one that carried her in. She
2 brought her in, set her down. She had one of those infant
3 seats she brought her in with car seat, set her by the side
4 of the chair. Mark came in little later. When he sat down
5 beside her in the chair, she looked up at him and started
6 screaming. So I picked her up and put her in the other room.

1 7 Q There has been testimony by Lori whether Mark was
8 ever alone with this child. What's your recollection
9 relative to that?

10 A When he was, when they were at my house--only
11 time, of course, I worked during the day I wouldn't know
12 during the day, only time he would be alone with her if they
13 happened to be in the bedroom, there was always someone in
14 the house. Any other time I wouldn't know because I was
15 either working or working somewhere else. They took Rebecca
16 a lot on the weekends, I would keep the other two kids. They
17 would take Rebecca when they would go visiting in Bradford or
18 wherever.

2 19 Q What about did you ever have any circumstances
20 that were unusual with contact between Rebecca and Mark?

21 A Yes, one time.

22 MR. FINK: I'm going to object to that it's
23 too broad and may or may not be objectionable, but the
24 question seems irrelevant.

25 THE COURT: Do you want to make an offer up

A-223

1 here.

2 (Following discussion held at the bench) MR.
3 LEBER: Miss Baker will testify that on one occasion Mr.
4 Bailey went into a bedroom because Rebecca was crying, closed
5 the door and Rebecca was heard to cry much more loudly after
6 that, that was at Miss Baker's home.

7 THE COURT: Okay.

8 MR. FINK: I have no objection.

3 9 Q You may go ahead. Answer the question.

10 A One time when they were still living at my house
11 Rebecca was in the bedroom, and I know it was when we were
12 still living there because she was in the crib in the bedroom
13 and she started crying, and Mark was the one that got up and
14 went into her. When he went in, he closed the door. I said
15 to Lori, why would he close the door? After he went in
16 there, she screamed. Lori then went in to bring Rebecca into
17 the living room.

4 18 Q What happened when Lori brought Rebecca out?

19 A She seemed to be upset. Nothing was ever--I
20 didn't ever talk to her about it or anything so.

5 21 Q During the time Rebecca lived with you did you at
22 any time, any other time notice any physical problems or pain
23 that Rebecca was having?

24 A At one time we were--there was one time when we
25 thought she had a dislocated hip. We had to be really

A-224

1 careful about how we touched her legs or diaper. We had to
2 lift her--normally you lift their legs to put diaper on. We
3 had to lift her buttocks to slide the diaper under. I was
4 concerned then and told Lori. My daughter had been born with
5 a dislocated hip. I thought maybe she had the same thing.
6 And so I told Lori she should take her to the doctor and ask
7 the doctor if that could be what the problem was.

8 MR. LEBER: Thank you, Miss Baker, nothing
9 else.

10 THE COURT: Counsel may cross.

11
12 CROSS-EXAMINATION BY MR. FINK:

6 13 Q Good morning to you. I apologize to you I didn't
14 catch your name.

15 A Tammy Baker.

7 16 Q Tammy, could you tell me, excuse me if my
17 questions elicit testimony that's already been given, but I
18 didn't quite understand all of your testimony. Okay.

19 A Okay.

8 20 Q Could you tell me when it was that Mark first came
21 to live with you and others in Coudersport?

22 A He lived there with Lori before she had Rebecca.
23 He had stayed at the house while she was pregnant because he
24 was the one going to take her to the hospital. So he lived
25 there then and then--

A-225

9 1

Q Excuse me, that tells me generally.

2

A I don't know dates, I just know they moved in.

0 3

Q How about a month, how about a season?

4

A When they first came there I'm not sure.

1 5

Q How about a season fall, spring, summer, winter?

6

A Could have been fall or winter of '95.

2 7

Q Fall or winter of '95. Of course Rebecca was born

8

in February of '96; right?

9

A Yes.

3 10

Q Now, before Rebecca was born, who lived in the

11

house after Mark got there?

12

A Lori and Mark and Lori's son, Alan, Lori's

13

daughter, Jennifer, my daughter and my brother lived there

14

off and on.

4 15

Q Who is your brother?

16

A Michael.

5 17

Q How old is he approximately?

18

A I think he turned 23 this year.

6 19

Q This was your home. Did you rent or did you own?

20

A I rent.

7 21

Q And it was in your name; right?

22

A Yes.

8 23

Q So you had control of, I guess, who came in and

24

who came out?

25

A Yes.

A-226

Q Now, after Rebecca or at the time Rebecca was born, I guess, immediately prior Mark took your sister to the hospital for the birth of Rebecca; is that correct?

A Yes.

Q Was the father of Rebecca in the picture at all as far as you're concerned?

A No.

Q Now, what was the first thing that you noticed about any injury or apparent injury to Rebecca?

A When she was real little her older brother had been wrestling around and fell on her. She was just a few months old and she had hurt her rib area.

Q How do you know that?

A That he hurt her rib area because there was a small black and blue mark. She was tender to touch, we had to be careful how we carried her.

Q What part did you take in the care of Rebecca? In other words, I want to know how much contact at that point you had with Rebecca?

A With Rebecca, I played with her and held her and stuff, but Lori took care of her more than I did.

Q Were you working at the time?

A Yes.

Q And your hours were?

A 8 to 5.

A-227

6 1 Q So I guess between basically say 7:00 in the
2 morning until six at night you did not see Rebecca, would
3 that be fair?

4 A Probably 7:30 to 5:30.

7 5 Q Now, do you know when it was that you first, that
6 Rebecca's little brother fell on her and hurt her rib?

7 A Yeah, he did that in the evening when I was
8 there. I had seen, I had witnessed that.

8 9 Q When was that?

10 A She was only a few months old, it would have been
11 spring.

9 12 Q Maybe April, March, March or April probably of
13 '96?

14 A April or May probably.

0 15 Q When was the next time you observed an apparent
16 injury or discoloration or something about Rebecca?

17 A Towards the end of summer I noticed her foot was
18 sore.

1 19 Q Now, what did you notice that she reacted
20 adversely to? A touch of her foot? How did it come that you
21 noticed that?

22 A Well, she had her socks off, and I noticed that
23 mark on her foot. She was also tender. Like her sister,
24 Jennifer, would swing her in the swing and she'd pull her by
25 her feet and she didn't like that.

A-228

2 1 Q Her sister would pull her?

2 A In the baby swing she would pull by her foot.

3 3 Q What kind of baby thing was that?

4 A Baby swing.

4 5 Q Sorry.

6 A That's okay.

5 7 Q That was a little swing that was set up in the
8 living room perhaps?

9 A Yes.

6 10 Q And she would be placed in the swing and her
11 sister would grab hold of her feet and pull and push her in
12 the swing?

13 A She would grab hold of her feet and pull her up so
14 she'd start swinging.

7 15 Q Can you describe to the jury what it was that you
16 saw on her foot?

17 A Well, like in between her toes and around her toe
18 nails it wasn't really black and blue like purple, black and
19 blue mark. I don't know how to describe, it was like little
20 brown dots.

8 21 Q Dots?

22 A Like dried blood or something under the skin,
23 something like that. It wasn't really purple, black and blue
24 type.

9 25 Q It was not black and blue?

A-229

1 A It was more, there was a lot of them around down
2 between the toe areas and around the toe nails.

3 Q How about Athlete's foot?

4 A No, I had seen--

5 Q It looked like skin irritation is what you're
6 saying?

7 A No, I had seen same type of mark on her sister,
8 Jennifer earlier, a few months earlier and I was told it was
9 probably she had gotten her hand caught between car seat and
10 door when they put her in the door, it's like a squeeze or
11 pinch or something like that.

12 Q I guess I want, I'm sorry, I'm not trying to pick
13 on you at all I'm trying to really understand what it was
14 that you saw, a little round dot or a number of little round
15 dots?

16 A A number of little round dots.

17 Q Were they colored?

18 A They were like brown or they looked like dried
19 blood underneath the skin.

20 Q Dried blood. Was there any--did you see any
21 obvious source of that blood?

22 A No.

23 Q Can you remember what foot it was?

24 A No, I don't recall.

25 Q Kind of irrelevant. It was between the toes?

A-230

1 A It was inbetween the toes and around the toe nail
2 area.

7 3 Q Okay. Was any question raised about it?

4 A Yeah, I had said to my sister I wondered what it
5 was. We had seen the same type of thing in Rebecca on
6 Jennifer.

8 7 Q On Jennifer?

8 A When she was younger also.

9 9 Q At this time in Rebecca's life was she being taken
10 to her doctor periodically?

11 A Yes.

0 12 Q Do you know whether or not it was shown to her
13 doctor at all?

14 A I don't think so, I don't know for sure.

1 15 Q Okay. And that was, I guess, what a few months
16 after you noticed the rib thing?

17 A Yeah.

2 18 Q That would take it into about June or July?

19 A Probably July.

3 20 Q What was the next thing you saw concerning Rebecca
21 and any marks of discomfort or evidence of discomfort?

22 A Well, when she--when she had--when we thought
23 maybe she had the dislocated hip, I don't know whether that
24 was at the same time or not, I knew that she was
25 uncomfortable and we thought maybe she had the dislocated

A - 231

1 hip.

2 Q Did you see anything?

3 A No.

4 Q How did she display her discomfort?

5 A When we went to change her diaper or anything like
6 that, she would get really whiney or cry if we picked her
7 legs up to change her diaper.

8 Q My kids would do that when I would do that, change
9 the diaper. Did you see any rash or anything?

10 A No, that's why we assumed dislocated hip.

11 Q You saw nothing. I gather from your testimony
12 there came a time when she cried a little more than usual
13 when her diaper was changed regardless of who changed it?

14 A Yes.

15 Q Next? What was the next thing you saw? Anything
16 else?

17 A Well, the time that Mark had left the room because
18 Rebecca was crying and when he went in the room she screamed.

19 Q Was that the incident about which you testified
20 she was crying in the room and Mark went into change her
21 diaper?

22 A I don't know what he went in the room for. He
23 went in the other room and closed the door.

24 Q When was this approximately?

25 A A few weeks before they moved out. They moved out

A-232

1 in September so it would be like in August.

2 Q Mid August, is that fair?

3 A Fair.

4 Q Mid August who was there at the time?

5 A Lori, my sister and her children, Jennifer and
6 Alan, Rebecca and Mark and myself and probably my brother
7 Michael.

8 Q Now, the baby is in the bedroom?

9 A Yes.

10 Q And the baby starts to cry?

11 A Yes.

12 Q And nobody gets up except Mark?

13 A Well, we were, he was the first one that got up.

14 Q Okay. And Mark goes into the bedroom and you hear
15 the baby cry louder; is that a fair statement?

16 A Yes.

17 Q Then Mark came out?

18 A Lori went in to see what was going on.

19 Q Okay. Did it come to your attention that anything
20 was going on or anything?

21 A Well Lori was upset when she came out, but the
22 baby was crying so I didn't ask any questions.

23 Q Okay. And then I guess the last thing that you
24 observed was the injury of around September 24?

25 A Yes.

A-233

0 1 Q Now, they by that time had moved to Roulette?

2 A Yes.

1 3 Q Is that true?

4 A That's true.

2 5 Q Were you also living in Roulette?

6 A No, I stayed here in Coudersport.

3 7 Q How did it come about that you saw the injury of
8 mid September?

9 A I babysat for Lori and Mark on weekends so they
10 could have time alone and they would bring the children over
11 on Friday or Saturday so they brought her over.

4 12 Q Got you. So Rebecca was brought to your house on a
13 weekend before she was taken to the hospital in late
14 September; is that a fair statement?

15 A Yes, that's true.

5 16 Q What did you observe in reference to Lori's foot
17 or ankle at the time?

18 A Rebecca's foot.

6 19 Q Sorry.

20 A I noticed that she had black and blue ankle. It
21 was black and blue around the ankle and real tender.

7 22 Q Do you remember when it was that you saw this?

23 A Yes, when Lori and Mark were there. Lori actually
24 showed it to me.

8 25 Q She showed it to you?

A-234

1 A Yes.

2 Q Do you recall whether it was swollen at that time?

3 A It was possibly. I don't remember if it was
4 swollen.

5 Q It's okay. As a result of that you tried to induce
6 Lori to take the child to the hospital at that time; is that
7 what your testimony was?

8 A Yes, that's true.

9 Q And I guess she didn't at that time?

10 A That's true.

11 MR. FINK: I have nothing further. Thank you
12 very much.

13 THE COURT: Anything further from the
14 Commonwealth?

15 MR. LEBER: No, I have nothing else, Mrs.
16 Baker.

17 THE COURT: Thank you, ma'am.

18 MR. LEBER: Call Chad Setzer to the stand
19 please.

20
21 C H A D S E T Z E R, having been duly sworn, was examined
22 and testified as follows:

23

24 DIRECT EXAMINATION BY MR. LEBER:

25 Q Your name and address, please?

A - 235

1 A Chad Setzer, R.D. 1 Box 451 Third Street,
2 Roulette.

3 Q How long have you lived in Potter County?

4 A All my life.

5 Q Did there come a point in time when you met Mark
6 Bailey?

7 A Yes, I did in Potter County Jail.

8 Q You were in the Potter County Jail at that time?

9 A Yes, I was.

10 Q You were an inmate?

11 A Yes.

12 Q And at that time were you aware of what Mark
13 Bailey was in the jail for, what was he charged with?

14 A Not when he came in I didn't, it was when I asked
15 him.

16 Q And what did Mr. Bailey tell you?

17 A He was being charged with breaking a baby's
18 bones. I didn't know the charges just that.

19 Q And when was that approximately?

20 A I can't remember.

21 Q When were you in jail?

22 A From November 30th until August 8th.

23 Q November 30th of 199_?

24 A 6.

25 Q Until August 8 of 1997; is that correct?

A-236

1 A Yes.

2 Q And how were you and Mr. Bailey housed at that
3 time?

4 A We were on C block, it's a four room block. They
5 usually don't have more than four people in there.

4 6 Q During the time you were on that cell block with
7 Mr. Bailey did you discuss with Mr. Bailey the charges
8 against him?

9 A Yes, I did.

5 10 Q Can you tell the Court what it was that Mr. Bailey
11 told you about what happened?

12 A He told me that he had the baby in his arms. He
13 had it like this, he was holding it up.

14 MR. LEBER: Indicating holding it above his
15 head in one hand.

16 A Yeah, he dropped the baby on the floor.

6 17 Q What else did he say to you about that?

18 A He told me that he dropped the baby and that he
19 was being charged with breaking its bones, but he said that
20 he wouldn't get in trouble for it because her brother sat on
21 her, that's what he was gonna say and he also asked Rodney
22 Colon how he could get out of jail and into a mental ward.

7 23 Q Did he tell you at that time how he felt about
24 this child and about his girlfriend?

25 A Yes, he did. He said the baby was inbetween him

A-237

1 and his girlfriend, it was nothing but a nuisance.

2 MR. LEBER: Thank you, nothing else.

3 THE COURT: Counsel may cross.

4

5 CROSS-EXAMINATION BY MR. FINK:

8 6 Q Good morning, young man.

7 A Good morning.

9 8 Q What were you in jail for?

9 A Drugs.

0 10 Q What about drugs?

11 A Selling.

1 12 Q You were in jail for selling drugs?

13 A Yes.

14 Q And that was in November of '96?

15 A Yes.

3 16 Q What was your sentence?

17 A 8 months.

4 18 Q Did you serve it?

19 A Yes.

5 20 Q Well, is it not true that it had a minimum and
21 maximum your sentence?

22 A Yes.

6 23 Q It was 8 months to what?

24 A I can't remember.

7 25 Q Sir?

A-238

1 A I can't remember.

2 Q You don't remember what your sentence was?

3 A No, I don't.

4 Q Are you on probation now?

5 A Yes.

6 Q Tell the jury a little bit about being on
7 probation. Is it not true that you are required to do
8 certain things for--as your probation officer directs?

9 A Yes.

10 Q How long are you going to be on probation?

11 A Until 11/13/99.

12 Q I'm sorry?

13 A 11/13/99 I believe.

14 Q You got a state sentence than; didn't you?

15 A No, I was on probation before.

16 Q Oh, you were on probation before you were arrested
17 for selling drugs?

18 A Yes.

19 Q Why?

20 A Criminal conspiracy.

21 Q To do what?

22 A Theft by Unlawful Taking.

23 Q What was the object of the theft?

24 A A weed eater.

25 Q What kind of drugs did you sell?

A-239

1 A Marijuana.

2 Q Were you in jail when Mark was put in jail?

3 A Yes, I was.

4 Q And approximately when was he first put in jail,
5 if you know?

6 A I can't remember dates in there.

7 Q I'm not asking dates, a month?

8 A I don't remember them, I'm sorry I don't.

9 Q That's okay, don't worry about it. He had a broken
10 arm at the time in jail?

11 A Yes, he did.

12 Q He was suffering from low blood sugar at the time?

13 A Yes, he was.

14 MR. LEBER: Objection.

15 A Yes.

16 Q He was having a tough time emotionally when he was
17 in jail; was he not?

18 A Yes, he was.

19 Q So his arm was in a sling; right?

20 A Yes.

21 Q He was having trouble with high or low blood
22 sugar, right?

23 A Right.

24 Q And there were times when he would literally shake
25 and quiver because of the low blood sugar; isn't that true?

A-240

1 A Yes.

2 Q And it was under these circumstances that he told
3 you what you told the jury he said, right?

4 A He wasn't always like that in jail, it was only
5 times.

6 Q He always had a broken arm?

7 A His arm was always broken, yeah.

8 Q Do you know whether or not he was always in pain
9 with his arm when he was in jail?

10 A I don't.

11 Q You don't know?

12 A I can't feel his pain.

13 Q Right. How old are you, young man?

14 A 21.

15 Q Where do you live? Where you from?

16 A Roulette.

17 Q Now, are you sure he told you that the baby
18 dropped on the floor? He didn't say he grabbed the baby by
19 the leg to keep the baby from dropping on the floor?

20 A No.

21 Q Didn't tell you that?

22 A No.

23 MR. FINK: I have no further questions. Good
24 luck to you, young man.

25 A Thank you.

A-241

1 THE COURT: Anything further for this
2 witness?

3
4 REDIRECT EXAMINATION BY MR. LEBER:

6 5 Q Mr. Setzer, you told the jury you sold marijuana.
6 How much marijuana did you sell?

7 A A half ounce.

7 8 Q A half ounce. And Mr. Fink asked you about being
9 on probation and you have to do what your probation officer
10 directs. Did he direct you to do anything relative to this
11 case against Mr. Bailey?

12 A No, he did not.

8 13 Q Did anybody tell you that you had to come in and
14 testify in this case?

15 A No, I wasn't talking to anybody from my probation
16 office or anything.

9 17 Q And did you receive any benefit because of coming
18 in here to testify from the police or from the District
19 Attorney's Office or probation or anything like that or from
20 the Court?

21 A No, I do not.

22 MR. LEBER: Thank you, I have nothing else.

23 THE COURT: Recross.
24

25 RECROSS EXAMINATION MR. FINK:

A-242

Q Did you ever tell my client that you had some counts dropped against you because you were willing to testify against Mark, did you ever tell him that?

A No, I did not.

Q Let me try to refresh your recollection. Is it not true that when you were in Cell Block C in jail with Mark you told him that you were going to have some counts dropped against you?

A That's not true.

Q Do you remember when you came back to jail with some papers that were given to you after just talking to your attorney or somebody that you showed to Mark?

A I've had a lot of papers in jail.

Q Well, do you recall an occasion when you came back to jail with some papers and showed them to Mark and discussed them with him; do you remember that?

A No.

Q Never happened?

A I might have discussed my case, but I did not discuss any papers from my attorney with him.

Q Well, let me ask you this. Do you remember ever discussing with Mark the Commonwealth willing to drop any charges against you for any reason?

A The only thing they ever dropped on me was secondary charges. I don't know if I mentioned that with him

A-243

1 or not.

2 Q You're saying that in fact the Commonwealth did
3 drop one or more of the charges against you; is that true?

4 A Yes, I did.

5 Q And?

6 A Yes, yes, they did.

7 Q And you don't know whether you discussed that with
8 Mark or not?

9 A I don't know. I don't think he was there at the
10 time they offered me a plea bargain. They offer a lot of
11 people plea bargains.

12 Q Well, let's get into that a little bit. What
13 charges were originally filed against you.

14 A I don't know.

15 MR. LEBER: I'm going to object. There's no
16 foundation for this. I think that we need to establish when
17 this discussion was. If it's before Mr. Bailey and Mr.
18 Setzer met, of course it's irrelevant.

19 THE COURT: I would think that some time
20 frame would be useful and of course any files that we have
21 here in the courthouse are certainly available.

22 MR. FINK: Very well, Your Honor, I'll try to
23 lay a little more foundation.

24 Q Do you know when it was that in respect to Mr.
25 Bailey being in jail that one or more charges were dropped

A-244

1 against you?

2 A I don't understand.

1 3 Q Okay. You have told us that certain criminal
4 charges were dropped against you; did you not?

5 A Yes, I did.

2 6 Q Now, at that time when you first learned of that
7 was Mr. Bailey in jail?

8 A I do not know.

3 9 Q Sir?

10 A I don't know.

4 11 Q Do you know when it was that you first learned the
12 charges were going to be dropped, some charge was going to be
13 dropped against you?

14 A I don't know when it was. I was in jail almost
15 nine and a half months. I denied my parole in Potter County
16 so I could finish community service hours before I had to go
17 to another County for failure to appear because I was in this
18 County. I failed to appear in another county. I wanted to
19 get my community hours so I denied my parole here. I don't
20 know. I was in jail almost nine and a half months. I don't
21 remember dates.

5 22 Q Were there charges in another county?

23 A Yes, there were.

6 24 Q Was that in addition to the conspiracy and
25 receiving stolen property?

A-245

1 A That was a DUI.

2 Q What county was that in?

3 A McKean.

4 Q Who was it that agreed to drop--you were talking
5 about Potter County charges where they agreed to drop some of
6 them; isn't that true?

7 A Yes.

8 Q And that was in reference to your drug arrest?

9 A Yes.

10 Q But you don't know whether you discussed that with
11 my client or not?

12 A I do not.

13 MR. FINK: I have nothing further.

14 THE COURT: Anything further?

15 MR. LEBER: Judge, since that went pretty
16 broad can I ask a few more questions?

17 THE COURT: You may.

18

19 MR. LEBER:

20 Q Chad, would it refresh your recollection when
21 there's a plea agreement entered in your experience, is that
22 placed, put in writing?

23 A Yes, it is.

24 Q And did you in fact make a plea agreement with the
25 District Attorney's Office relative to your drug charges?

A-246

1 A Yes, I did.

2 Q And did that again have anything to do about any
3 testimony against Mr. Bailey?

4 A No, it did not.

5 Q Mr. Setzer, I'm going to show you what's been
6 marked as Commonwealth Exhibit Number 6, ask if you can
7 identify that?

8 A That's my plea agreement.

9 Q And whose signatures appear on there?

10 A Bob Kuhl, mine, I can't read the other one.

11 Q Probably mine than I suspect. Does it look like
12 it might be?

13 A Probably is.

14 Q And is there anything in there that says anything
15 about you testifying on behalf of the Commonwealth against
16 Mr. Bailey?

17 A No, there is not.

18 Q And then you had mentioned another matter. I
19 guess you didn't mention that another matter, retaliation
20 against witnesses that you were charged with about that time?

21 A Yes,.

22 Q Incidentally what's the date of that plea
23 agreement?

24 A 4/16/97.

25 Q And I'm going to show you what's been marked as

A-247

1 Commonwealth Exhibit Number 7, ask if you can identify that
2 please?

3 A Another plea agreement.

1 4 Q Again who signed that?

5 A Same people.

2 6 Q And the date of that is?

7 A Same date 4/16/97.

3 8 Q And that's when you entered your plea on both of
9 those charges?

10 A Yes.

4 11 Q And before that time you were in jail because of a
12 probation violation; is that true?

13 A Yes, it is.

5 14 Q Relative to the first matter, the one you referred
15 to as drugs you see after each of those charges the various
16 Counts 1, 2, 3, 4, et cetera. There is an F or M do you know
17 what that F or M means?

18 A Felony or Misdemeanor.

6 19 Q What's the more serious?

20 A Felony.

7 21 Q And relative to the drug charges what did you
22 plead guilty to?

23 A Two Felonies.

8 24 Q And that is conspiracy and delivery of drugs; is
25 that correct?

A-248

1 A That's correct.

2 Q And one Felony and one Misdemeanor, what happened
3 with them?

4 A They were dropped.

5 Q And I guess there's two other Misdemeanors down at
6 the bottom those were?

7 A Dropped.

8 Q And on the matter at Number 18 of 1997 you were
9 charged with how many counts?

10 A Three.

11 Q And the first count was criminal conspiracy; is
12 that correct?

13 A Yes, it is.

14 Q That was graded as?

15 A Felony 3.

16 Q And you plead guilty to that?

17 A Yes, I did.

18 Q And what charges were dropped?

19 A Terroristic threats and criminal attempt.

20 Q And those are graded as what?

21 A Misdemeanor 1 and Felony 3.

22 Q So again at any time was there any discussion
23 either on the record or off the record about you testifying
24 against Mr. Bailey?

25 A No, there wasn't.

A-249

1 MR. LEBER: Thank you, nothing else.

2 MR. FINK: Just briefly.

3

4 MR. FINK:

8

5 Q The plea agreements, and I guess there are two of
6 them, the first one indicated that you were charged with six
7 counts, six, is that not true?

8 A True.

9

9 Q Criminal Conspiracy, Violation of the Drug Act,
10 Delivery, Violation of the Drug Act, Delivery, Violation of
11 the Drug Act Possession, Violation of the Drug Act Possession
12 of Paraphernalia and Theft by Deception all on one criminal
13 complaint; is that true?

14 A True.

0

15 Q And the Commonwealth agreed that if you would
16 plead guilty to the first two they would drop four of the six
17 charges; is that true?

18 A True.

1

19 Q Now, by plea agreement on the same day there were,
20 indicates that on the criminal complaint you were charged
21 with Criminal Conspiracy, Terroristic Threats and Criminal
22 Attempt is it my understanding that terroristic threats was
23 based upon an allegation that you threatened a witness?

24 A True.

2

25 Q And you plead guilty to Criminal Conspiracy a

A-250

1 Felony 3. What was that Criminal Conspiracy charge about?

2 A Retaliation. We conspired to retaliate.

3 Q You plead guilty to a charge that you conspired
4 with another to retaliate against a witness; is that true?

5 A True.

6 Q Now, this is dated 4/16/97. You say you don't
7 know whether Mark Bailey was in the jail at that time?

8 A I don't know.

9 Q Thank you very much.

10 THE COURT: Alright. Thank you, witness may
11 step down.

12 MR. LEBER: Trooper Dawson please.

13
14 W I L L I A M D A W S O N, having been duly sworn, was
15 examined and testified as follows:

16
17 DIRECT EXAMINATION BY MR. LEBER:

18 Q Your name and address, please?

19 A William L. Dawson, Pennsylvania State Police,
20 R.D., Coudersport, Pennsylvania.

21 Q And you're a state Trooper; is that correct?

22 A That's correct.

23 Q How long have you been so employed?

24 A Little over 25 and a half years.

25 Q What's your specialty within the state police?

A-251

1 A Criminal Investigator.

0 2 Q And what is the responsibility of a Criminal
3 Investigator?

4 A We usually get assigned more involved criminal
5 incidents, basically time consuming incidents.

1 6 Q What was Trooper Davis, who has testified here,
7 what was his role in this investigation?

8 A He was called in to assist me as being a polygraph
9 operator.

2 10 Q And was he involved in the case any more than on
11 that one particular day to conduct a polygraph test?

12 A No, sir.

3 13 Q Now, when was it that Mr. Bailey was in fact
14 placed under arrest?

15 A March the 19th of 1997.

4 16 Q And at that time was he placed in incarceration?

17 A Yes, sir, he was picked up on a warrant, placed in
18 the jail.

5 19 Q Now, one other sort of clerical thing I wanted to
20 clear up. There's been testimony in this case about what
21 happened on September 24th of 1996. Have you consulted a
22 calendar? Did you have in your notes what day of the week
23 September 24th, 1996 was?

24 A That was a Tuesday.

6 25 Q So people who have testified it was a Monday are

A-252

1 in error?

2 A According to the calendar, yes, sir.

7 3 Q During the course of the investigation how many
4 times did you have an opportunity to interview Mr. Bailey?

5 A Three times.

8 6 Q The first time was when?

7 A October 26th of 1996.

9 8 Q And at that time did you question him regarding
9 the specific allegations in this case, that is that Rebecca
10 Moore had suffered several broken bones?

11 A Yes, sir, I did.

0 12 Q Did he have any kind of explanation for you at
13 that time?

14 MR. FINK: Your Honor, I'm going to object to
15 the word explanation. There's no suggestion that he has to
16 explain anything at this point.

17 THE COURT: Sustained as to that word.

1 18 Q Did Mr. Bailey provide you with any information
19 that indicated how these injuries to Rebecca Moore may have
20 been caused?

21 A He basically had no idea other than accidents
22 involving siblings at the time.

2 23 Q Now, when and where did this first interview
24 occur? You said it was in October of 1996.

25 A It occurred at the Pennsylvania State Police

A - 253

1 barracks on Denton Hill, outside of Coudersport.

2 Q And in that particular interview and in all
3 interviews you do with defendants do you give them any
4 warnings before you proceed to interview?

5 A Yes, sir, Mr. Bailey was advised of his Miranda
6 warnings prior to the statement.

7 Q That was the first time you talked to Mr. Bailey?

8 A That's correct.

9 Q When was the next time?

10 A I believe I spoke to him on the phone just very
11 briefly. I think it was around the first of February of 97.

12 Q And what did you speak to Mr. Bailey about at that
13 time?

14 A Just to confirm that he was still willing to take
15 a polygraph test.

16 Q And was a polygraph test then set up at that time?

17 A Yes, sir, it was.

18 Q And when was the polygraph test to be held?

19 A On the 28th of February of 1997.

20 Q And where was that to be held?

21 A At the Coudersport State Police Barracks.

22 Q And did you have discussions with Mr. Bailey
23 before the polygraph test was administered?

24 A Yes, sir.

25 Q And at that time did you take a statement from Mr.

A-254

1 Bailey?

2 A Yes, sir, I did.

2 3 Q And was that first statement tape recorded?

4 A No, sir, it was not.

3 5 Q When was that statement relative to the tape
6 recorded statement that has been mentioned in this case?

7 A It was roughly two hours prior to.

4 8 Q And at that time did Mr. Bailey--again was he
9 advised of his Miranda Rights?

10 A Yes, sir, he was.

5 11 Q And how do you give them to him?

12 A I read them verbatim off of the statement form.

6 13 Q Did Mr. Bailey indicate whether he understood
14 them?

15 A Yes, sir, he did.

7 16 Q Did he indicate at that time he was willing to
17 talk to you?

18 A Yes, sir, he did.

8 19 Q Now, at that time when you talked to Mr. Bailey
20 did Mr. Bailey make any statement about what happened to
21 Rebecca that caused the leg injury in September of 1996?

22 A Yes, sir, he did.

9 23 Q What did he tell you?

24 A He told me that he had been somewhat playing with
25 Rebecca and had held her above his head with his left hand

A-255

1 open palmed and was twisting her back and forth and she began
2 to slip out of his hand and to prevent her from hitting the
3 floor he grabbed a hold of her right leg with his right arm
4 and drew her into his body.

0 5 Q And did he give you a date on which that occurred?

6 A He advised me that to the best of his knowledge it
7 was the day prior to the girl being taken to the hospital,
8 which would have been the 23rd of September.

1 9 Q Now, did he describe what physical affects he saw
10 on Rebecca's body as a result of that incident?

11 A He stated that the following day Lori showed him
12 the leg and that it appeared swollen and bruised.

2 13 Q During that interview did you ask Mr. Bailey
14 whether or not he had done anything else to Rebecca?

15 A Yes, I believe I did.

3 16 Q And how did he respond to that?

17 A That he had not.

4 18 Q And after you completed that short interview, what
19 happened then?

20 A Mr. Bailey at that point had agreed to go ahead
21 with the polygraph test, and he was then basically taken into
22 the conference room where he was again advised of his rights
23 by Trooper Davis and witnessed by myself, and I then left the
24 room and he Trooper Davis conferred or talked.

5 25 Q How long did it last that defendant was in the

A-256

1 room with Trooper Davis?

2 A I would venture to say perhaps 20 minutes, give or
3 take, I really don't know, 15.

6 4 Q The statement that you said Mr. Bailey gave you
5 before he went into the polygraph room or have the polygraph
6 done with Trooper Davis what time was it approximately when
7 you had that?

8 A About 1:00.

7 9 Q That would be in the afternoon?

10 A That is correct.

8 11 Q Did anyone else come with Mr. Bailey to the State
12 Police Barracks at that time?

13 A Yes, sir.

14 Q Who was that?

15 A Lori Moore.

0 16 Q Now, what happened after Mr. Bailey and Trooper
17 Davis were in the room together in that 15 minutes or however
18 long it was, what happened then?

19 A Trooper Davis then came and contacted myself and
20 advised me that Mr. Bailey had made certain statements to him
21 and that negated the necessity for the polygraph test that we
22 could take another statement from him.

1 23 Q Tell us when you talked to Mr. Bailey at 1:00 and
24 times after that whenever he was taken to give the statement
25 how Mr. Bailey acted, what was his demeanor like?

A-257

1 A The first statement I took from him on the 28th of
2 February he, when he talked about the one incident he seemed
3 somewhat remorseful at that point to a great degree. Then
4 during the second statement he came somewhat emotional,
5 crying, so on.

2 Q Trooper, Dawson, I'm going to show you a Sony
6 microcassette with various markings on it and we'll consider
7 this as Commonwealth Exhibit Number 9.

8 MR. FINK: Your Honor, although I don't think
9 a record was made of it in chambers we have already stated
10 that we have no objection. As far as we're concerned the
11 district attorney does not have to further qualify that as
12 being a true and authentic tape of the conversation:

13 THE COURT: Thank you very much.

14 MR. LEBER: Thank you, Your Honor.

3 Q And again this is the tape that was taken when?
15 A On the afternoon of February 28th, 1997.

16 A On the afternoon of February 28th, 1997.

4 Q And who was present whenever this tape recording
17 was made?

18 A Myself, the defendant, Mr. Bailey and Trooper
19 Davis.

20 MR. LEBER: Your Honor, with leave of the
21 Court I'd like my secretary to come up and play this tape for
22 the jury.

23 MR. FINK: No objection, Your Honor.
24
25

A-258

1 THE COURT: Ladies and gentlemen of the jury,
2 you'll hear a tape recorded, I guess, interview for lack of a
3 better term. If any of you have any difficulty hearing
4 please put your hand up and let us know we'll try and do
5 that.

6 (Tape played).

5 7 Q Trooper, Dawson, were there a couple more lines in
8 that statement after Miss Colton shuts that off?

9 A Yes.

6 10 Q The last thing I heard on the tape was you saying,
11 are you sorry for what has happened to Rebecca or for
12 anything that has happened? And did Mr. Bailey respond to
13 that?

14 A Yes, sir, he did.

7 15 Q What did he say?

16 A He said he was very sorry, he didn't want it to
17 happen again.

8 18 Q And how did you conclude the tape then?

19 A I think I stated, I know, Mark, we don't want it
20 to happen again so we'll try to do what we can to help you
21 okay. It's now about 1553 hours on February 28th, 1997 and
22 we'll conclude this interview at this time.

9 23 Q That's the end of that interview?

24 A That terminated the interview, correct.

0 25 Q Who was present throughout that interview with Mr.

A-259

1 Bailey?

2 A Mr. Bailey was present, myself, and Trooper Davis.

1 3 Q And the voice on that tape recording asking the
4 questions was whom?

5 A Was myself.

2 6 Q And there was a long inaudible question close to
7 the end. Who was that?

8 A That was Trooper Davis. He was further away from
9 the tape recorder.

3 10 Q And the person who was responding to these
11 questions that were asked is whom?

12 A Mr. Bailey.

4 13 Q You're indicating the defendant next to Mr. Fink;
14 is that correct?

15 A That is correct.

5 16 Q One other thing. Little Alan Moore testified here
17 yesterday. Did you talk to him at one point?

18 A Yes, I did.

6 19 Q Do you remember where and when that occurred
20 approximately?

21 A I don't recall exactly when I spoke to him, during
22 school hours when he was attending school in Port Allegany.

7 23 Q Alan testified yesterday that he observed the
24 defendant take Rebecca out of a car seat, that she might have
25 been injured at that point. Did you ask Alan when you

A-260

1 interviewed him whether he ever saw Mr. Bailey hurt Rebecca?

2 A Yes.

3 Q And how did he respond?

4 A He responded, no, at that time he did not.

5 MR. LEBER: Thank you, I have nothing else.

6 THE COURT: Very well, defense may cross.

7

8 CROSS-EXAMINATION BY MR. FINK:

9 Q Officer, good morning to you.

10 A Good morning.

11 Q The last question or series of questions
12 propounded by the District Attorney concerning little Alan
13 who testified here yesterday do I understand that you had
14 interviewed him at some previous time?

15 A That is correct.

16 Q And he said he didn't know my client?

17 A No, that's not what he said.

18 Q He said he didn't see any thing such as he
19 testified to yesterday?

20 A Correct.

21 Q Now, going back to the series of interviews you
22 had with my client. Your first interview or first contact was
23 on or about October 26th of 1996; is that true?

24 A That is correct.

25 Q And that physically took place at the State Police

A-261

1 Barracks just outside of Coudersport; is that true?

2 A That's true.

5 3 Q How did it come about that he got there? Was he
4 under arrest or anything?

5 A No, sir.

6 6 Q Was he requested to or asked to come?

7 A He and Lori were asked to come.

7 8 Q And he voluntarily came?

9 A And he voluntarily came, that is correct.

8 10 Q I guess you don't know was he told for what
11 purpose that he was being asked to come to the barracks at
12 that time?

13 A Yes.

14 Q What was he told?

15 A Basically the investigation and the injuries of
16 Rebecca Moore.

0 17 Q Okay. And my understanding of your testimony is
18 that he basically said that he had no idea of how a
19 particular injury or any injuries concerning Rebecca
20 occurred. Was that the substance of his statements to you at
21 that time?

22 A That is correct, that's basically correct.

1 23 Q Next you had a telephone interview with him on or
24 about February 1st, 1997; is that correct?

25 A I recontacted him and Lori by phone.

A-262

2. 1 Q You called him?

2 A Right.

3 3 Q What did you ask him at that time?

4 A Well, in order to answer that question I'll go
5 back to the interview on the 26th of October.

4 6 Q Fine.

7 A At that point I asked him if he would be willing
8 to take a polygraph test relative to this incident.

5 9 Q What did he say on October 26th?

10 A He said he would be doing that. So in February I
11 merely contacted him to see if he was willing to do so prior
12 to my going to the extent of making the arrangements.

6 13 Q Officer, I guess you say that most lay man don't
14 understand how a polygraph test works would you say that
15 would be probably true?

16 A Probably true.

7 17 Q When you asked him on October 26th if you were
18 willing to take a polygraph test, did you explain it to him?

19 A No, sir.

8 20 Q You just asked him are you willing to take a
21 polygraph test?

22 A That's correct.

9 23 Q Didn't tell him what it was, didn't for what
24 purpose, didn't tell who would give it, didn't tell when it
25 was to be given or why or anything else?

A-263

1 A I didn't know when it was to be given, the time
2 and date had not been set.

0 3 Q I'm just asking.

4 A No.

1 5 Q Now, we're up to the phone conversation of
6 February 1st and you call him and you ask him are you willing
7 to take a polygraph test and again no explanation?

8 A None other than it was relative to this incident.

2 9 Q Did you tell him he didn't have to take a
10 polygraph test?

11 A Certainly.

3 12 Q Did you tell him anything else about the test at
13 all? Whether the results could or could not be used in
14 court, what it might or might not show, what would occur if
15 certain answers were given as opposed to other answers,
16 anything at all?

17 A No, sir.

4 18 Q Okay. It is my understanding that there are only
19 one or two polygraphs or people who can operate a polygraph
20 test or give a polygraph test in the troupe?

21 A I believe Trooper Davis is the only one in our
22 troupe area.

5 23 Q The troupe headquarters is in Montoursville?

24 A That's correct.

6 25 Q And it covers a particular geographical area;

A-263

1 right?

2 A That's correct.

7 3 Q And so pursuant to the phone conversation
4 initiated by you to my client it was agreed that a time would
5 be set up to whereupon he was to come in and submit to a
6 polygraph test; is that true or not?

7 A Prior to which contact?

8 8 Q No, the phone conversation of February 1st.

9 A That was strictly to make sure he was still
10 willing to do that so I could go ahead and make the
11 arrangements.

9 12 Q So you made the arrangements and then Trooper said
13 he'd come up on certain day, you called my client back and
14 said come in on such a day. Is that the way it worked?

15 A Correct.

0 16 Q And the second phone call to notify him of the
17 polygraph test again no explanation of what was happening of
18 the polygraph test, the results, the possible consequences or
19 anything else?

20 A No, sir, I'm not the polygraph operator.

1 21 Q I know that. And so on a given day pursuant to
22 your second phone call to my client he came in together with
23 his girlfriend?

24 A That's true.

2 25 Q Now, before he went in the room with the officer

A-264

1 who was to give the polygraph test did you tell him anything
2 about consequences or describe anything to him about the
3 results of the test at that time?

4 A No.

3 5 Q Was Sergeant Shirley there?

6 A Sargent Shirley was at the barracks, yes.

4 7 Q Was there anything said about, either before or
8 after the pretest interview conducted by the polygrapher, was
9 anything said to my client that if he would admit to causing
10 the injuries to Rebecca that a certain consequence would
11 happen?

12 A Not to my recollection.

5 13 Q Let me see if I can refresh that recollection. Did
14 you or Sergeant Shirley in your presence tell my client that
15 if he admitted to causing the injuries to Rebecca that he
16 would get nothing more than a fine?

17 A I can't imagine a statement like that being made
18 by an officer, no, sir.

6 19 Q I'm with you, officer, I can't either, but the
20 question is do you remember, did you say that or didn't you?

21 A No, sir, I didn't say that.

7 22 Q Did you hear Sergeant Shirley say that?

23 A Not to my recollection, he did not.

8 24 Q So as I understand it my client comes in the
25 barracks, he is shown into another room where first you and

A-265

1 the polygrapher and my client are, then you go out and the
2 polygrapher and my client are alone and the pretest
3 commences?

4 A True.

9 5 Q Now, is the pretest really part of the test? Is
6 that ordinarily done before any polygraph test is given?

7 A A pretest interview is conducted by the examiner,
8 yes.

0 9 Q Again, nothing was told to my client about whether
10 the results of the polygraph test could be used in court or
11 any consequences of the polygraph test or what it was?

12 A That I don't know. All I was there was basically
13 for the reading of his rights. I witnessed the reading of
14 his Miranda Rights and I left the room. I didn't know what
15 Trooper Davis explained.

1 16 Q Tell the jury what you read, the Miranda rights
17 what does that mean?

18 A That means he does not have to talk to us without
19 an attorney present. If he could not afford to hire an
20 attorney, one would be provided for him at no charge,
21 basically.

2 22 Q You done good. Is he is informed that he doesn't
23 have to do this?

24 A That's correct.

3 25 Q And if he wants to do it, he can have an attorney

A-266

1 present if he wishes?

2 A Correct.

4 3 Q And notwithstanding that he said in essence, go
4 ahead?

5 A That's correct.

5 6 Q I want you to tell me, did he have his arm in a
7 sling at the time?

8 A Yes, sir, I believe he did.

6 9 Q Was he asked about any discomfort that may have
10 been occurring at the time because of that arm being in a
11 sling, was he asked about it at all?

12 A Again, I don't know if Trooper Davis asked him. I
13 don't believe I did.

14 Q You didn't?

15 A Not that I recall.

8 16 Q The forearm was that taped to his side at the
17 time?

18 A That I don't know.

9 19 Q You can't recall?

20 A I don't recall it.

0 21 Q Well you saw it?

22 A His arm was in a sling in February. He certainly
23 didn't have his shirt off.

1 24 Q The question is you did see his arm in a sling?

25 A Yes, but taped I don't know.

A-267

Q The answer is, yes, but you can't recall whether his forearm was taped to the his side or not because of the length of time; right?

A Yeah.

Q You said at some point he seemed very upset and broke down and cried, I think, was your testimony?

A Hm-hmm, that's correct.

Q When was that in relation to the pretest before, during or after?

A It was during the interview, the taped interview.

Q So it was after the pretest?

A After the pretest.

Q To answer my question. The taped interview did not take place in the polygrapher room; is that true?

A That is not true it did take place in that room.

Q It did take place in the polygraph room?

A That's correct.

Q And as I understand it sometime during the pretest the officers, the polygrapher says, well, stop, calls you in and says he's confessed?

A Basically, that's correct, yes.

Q And so we'll take an interview of his confession, is that essentially correct?

A Yes, sir.

Q Did you tell him that you're going to tape the

A - 268

1 interview?

2 A Yes, sir.

1 3 Q He had no objection to the taped interview?

4 A No, he did not.

2 5 Q And he was, I'm sure, told that if he didn't want
6 the taped interview he wouldn't have to give it?

7 A Yes.

3 8 Q Okay. Your last statement on the taped interview,
9 officer, preceded by Mark saying, I'm sorry I just don't want
10 it to happen again, and you say, I know, and, Mark, we don't
11 want it to happen again either so we'll try to do what we can
12 to help you. Okay it's now about 1553, so on, so forth.
13 What did you mean we'll do what we can to help you?

14 A Mean try to do what we can so he doesn't injure
15 anybody else.

4 16 Q What did you have in mind? I don't know what you
17 meant by that. I guess I'd like to have you tell the jury
18 what you had in mind?

19 A I'd be willing to help him seek, see Pat Rupert if
20 I could do that, help him seek more counseling if I could do
21 that, whatever he wanted to do.

5 22 Q When was the arrest effectuated?

23 A I believe the the 19th of March.

6 24 Q When was the interview?

25 A The 28th of February.

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7 1 Q Now, you got what you considered to be a
2 confession; is that true?

3 A Correct.

8 4 Q On the 28th of February and 20 days elapsed
5 between what you considered to be a confession and your
6 arrest of the defendant; is that true?

7 A Basically, yes, I don't have, I haven't counted
8 them.

9 9 Q Now, let's let the jury understand a little bit
10 about the procedure that you go through in effectuating an
11 arrest, you merely essentially take possession of the body of
12 the defendant and put him under your control; is that not
13 true?

14 A That's true.

0 15 Q And he is taken before the District Justice after
16 an arrest?

17 A True.

1 18 Q Did you do that in this case or did you initiate a
19 process otherwise?

20 A We had a warrant and physically picked him up and
21 took him before the magistrate.

2 22 Q The district justice issues the warrant; right?

23 A Right.

3 24 Q And issues the warrant at your request basically?

25 A Correct.

A-270

Q And the district justice, a district justice is always available in Potter County at any time; is that not true?

A That's true.

Q And that process of obtaining a warrant at takes maybe 20 minutes to half an hour; is that a fair statement?

A You talking about the whole process, the entire process or the process before the magistrate.

Q The process of getting a warrant?

A It takes me little longer than that.

Q How long does it take you?

A Depends on what the circumstances are. If I have to sit down at the typewriter, type up the criminal complaint. If I have to type it, it takes me longer than that filing procedure and what takes place at the office.

Q Let's talk about that.

THE COURT: I'm going to interpret here I got to give reporter a break. Ladies and gentlemen, we're going to take morning recess at this time for approximately ten minutes. During this recess as with the others again, do not discuss the case among yourselves or with anyone else don't let anyone talk to you about the case. I want you to avoid all media reports. Court will stand in recess for ten minutes.

(Recess).

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1 THE COURT: We will note the jury is not
2 present, however, the parties are present with counsel. Mr.
3 Fink, you indicated there was something you wished to place
4 on the record.

5 MR. FINK: I brought to the attention of the
6 Court during recess that the motion that I wish to make at
7 this time would in no way be affected by any additional
8 cross-examination that I may have of the officer or indeed
9 any further testimony of the officer at all. I wish to--it is
10 my understanding that this is the Commonwealth's last
11 witness.

12 MR. LEBER: Correct.

13 MR. FINK: That being so, Your Honor, we
14 would move for directed verdict of acquittal or a demur to
15 the evidence based upon the corpus delecti rule. It is the
16 position of the defendant, Your Honor, that viewing all of
17 the non confession evidence in a light most favorable to the
18 Commonwealth the Commonwealth has clearly failed to prove
19 beyond a reasonable doubt that the particular crimes with
20 which the defendant has been charged occurred. The issue is
21 not who committed them, but the issue is, as I understand the
22 law, as set forth by the leading case in its prodigy, is the
23 Court at the time he charges the jury must charge the jury
24 that if they do not find that Commonwealth has proven beyond
25 a reasonable doubt that the particular crimes with which the

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1 defendant has been charged occurred and that victim was
2 harmed as a result of those particular crimes the jury can
3 not consider any evidence of confession. I think that's
4 exactly where we are, and it is our claim that as a matter of
5 law, as a matter of law viewing the record as previously
6 suggested the jury cannot make that finding. And,
7 accordingly, Your Honor, it is our position that based upon
8 the record as it is the Court must grant the motion.

9 I would like to make an additional motion and that is
10 that same motion that namely that the Court must enter a
11 directed verdict of acquittal as to each and every charge of,
12 I think, the 15 counts, whatever there are in the criminal
13 information in favor of the defendant, and or in the
14 alternative we demur to the evidence as to each and every
15 charge. Even if you consider the confessions, because I
16 don't believe if you consider the confessions that the crimes
17 of aggravated assault, simple assault, with the element of
18 intent or the reckless conduct as the cases describe
19 recklessness as it relates to aggravated and simple assault
20 have been proven beyond a reasonable doubt taking into
21 consideration the evidence in light most favorable to the
22 defense. So for those reasons, Your Honor, we respectfully
23 request a directed verdict of acquittal and or demur to the
24 evidence.

25 THE COURT: Thank you. Commonwealth do you

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1 care to reply?

2 MR. LEBER: Judge, I have no problem obviously
3 with the charge to the jury concerning the corpus delecti
4 rule and assume the Court was going to do that. But beyond
5 that it seems to me that clearly the threshold requirement
6 has been met, that testimony of the three physicians was that
7 there was in fact abuse of this child and that led to
8 particular injuries that were suffered. Again, I think
9 clearly the threshold issue, threshold requirement is met by
10 the testimony that was produced before any evidence was
11 produced of a confession, and I think the Court should
12 proceed.

13 MR. FINK: May I say one further thing on
14 corpus delecti?

15 THE COURT: Is the Commonwealth done.

16 MR. LEBER: I'm done.

17 MR. FINK: I would respectfully request the
18 Court to consider the posture of the case, and if the Court
19 refused my motion at this stage, allows the case to go to the
20 jury, the jury would bring in a verdict of guilty. I would
21 think that on a post sentence motion considering the record
22 as it is now the Court would be compelled to find as a matter
23 of law the jury could not find that Commonwealth proved that
24 the crimes had been committed by evidence extrinsic to the
25 confession evidence, and so I think it's a question of do you

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1 want to do it now or do you want to do it later as I see the
2 case.

3 THE COURT: Thank you. Again to pick up on
4 our discussion of yesterday. I think essential elements of
5 the law particularly as relating to the corpus delecti rule
6 have been correctly set forth. First, the Court is required
7 to make a decision, which I did yesterday, that the evidence
8 is more consistent with criminality than accident or other
9 non criminal causes. We are talking here about a series of
10 fractures in an otherwise healthy infant. We are looking at
11 the testimony of a number of health care providers, who I'll
12 be the first to say had some intriguing concepts of what is
13 and what is not abuse, but I'm not sure that has anything to
14 do with this decision because I think in looking at this the
15 Court ultimately like the jury can use some common sense
16 approach to this, and I think that under any standard the
17 evidence aside from the alleged confession is far more
18 consistent with criminality than accident or non criminal
19 causes. We could change a few facts and or, I shouldn't say
20 facts, we could change a few of the Commonwealth assertions
21 made through testimony and that might be, for example,
22 query. I'm not saying I would rule differently if we were
23 looking at one fracture given the state of the record, if
24 we were looking at fractures with some diagnosed health
25 problem of the child that might make the child more prone to

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1 fractures, than I think that would be an issue that would
2 warrant certainly further concern, but at this time I
3 reaffirm my position of yesterday. I feel that the evidence
4 is far more consistent with criminality than accident or
5 other non criminal causes. We will have to broach that in the
6 jury charge, and what the jury does with that. I can't
7 speculate what they'll do with that I'm sure counsel will all
8 talk about that in your closing arguments at the appropriate
9 time. So I will be denying the motions made relative to the
10 corpus delecti rule.

11 For the other motions, the demurs, we are looking
12 essentially at three offenses times four incidents each of
13 aggravated assault, that defendant allegedly attempted to
14 cause serious bodily injury or caused such injury
15 intentionally, knowingly or recklessly. And there are
16 elements. And then, of course, we go to causing
17 intentionally, knowingly or recklessly causing serious bodily
18 injury, and we're looking at Endangering the Welfare of a
19 Child by violating duty of care. I think there is sufficient
20 evidence there that the jury could form a basis for a verdict
21 of guilty if they accept the Commonwealth evidence as
22 presented. Again, that is within their province using common
23 experience and common sense. So I feel that evidence at this
24 stage is sufficient to go to the jury subject, of course, to
25 the special charges that have been submitted. Thank you very

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1 much. We'll bring the jury down.

2 THE COURT: Welcome back, ladies and
3 gentlemen of the jury. We did give our court reporter a
4 break then we had matters to deal with before you came down.
5 I try to give her regular break otherwise she ends up working
6 through our breaks. I doubt if we understand the intensity
7 of what Ann Marie does because she listens to what everyone
8 says. Of course, we've also been known to have more than one
9 of us speak at a time so that makes it complicated. As she
10 is hearing she has to set it down with her Stenograph keys
11 and that is transmitted to a computer disk. So it's a very
12 intense type of thing. I'm sometimes guilty of running a
13 little bit too long. I like to give her a break
14 approximately hour and a half to hour 40 minutes. So
15 sometimes we all get carried away with the moment and don't
16 do that. I gave her a full break, did a little more business
17 now we're back with business with you Trooper Dawson was on
18 the stand subject to cross.

19 MR. FINK: Thank you.

9 20 Q Officer, we're talking about what is necessary to
21 effectuate an arrest. You have told the jury that it was 19
22 or 20 days between the statement that was given to you, which
23 you deemed to be a confession and the actual arrest of the
24 defendant. Is that true?

25 A That's true.

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Q Now, I was asking you about the availability of district justices within the county from whom you were to get a warrant for the arrest of any individual charged with a crime, and you indicated that always in Potter County there is some district justice that is available for that purpose. I then asked you what was necessary in terms of procedure and time, and I guess you were telling the jury that you first have to physically type up a criminal complaint, which is the statement of criminal charge or charges against any particular defendant; is that true?

A That's true.

Q Okay. Now, in this case there was quite a list of them, I guess, you don't type fast but I guess you would have taken no more than an hour to prepare that complaint?

A Approximately.

Q And then you would file that complaint with the district justice, would you not?

A That's true.

Q And the district justice at your request after having received the complaint would issue a warrant for the arrest of the defendant?

A Correct.

Q And is there any other procedure in the arrest process which is involved?

A Usually would confer with the District Attorney's

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1 Office prior to doing all of what you just mentioned.

2 Q I'm sorry?

3 A Usually I would confer with the District
4 Attorney's Office prior to.

5 Q You would ask the district attorney if it's okay
6 to file a criminal complaint?

7 A In some circumstances I just review where we stand
8 in the investigation with him.

9 Q Okay. Was there any unusual unavailability of the
10 district attorney or assist district attorney in reference to
11 this arrest?

12 A Not that I recall, no.

13 Q So the district attorney as far as you're
14 concerned was available. So what we're talking about you
15 first go to the district attorney who is available, you then
16 take an hour to prepare a complaint, you then take the
17 complaint down to district justice, take her maybe 15 or 20
18 minutes to prepare the warrant of arrest, would that be
19 reasonable?

20 A Reasonable, yes.

21 Q And would physically give you the warrant and you
22 would actually serve it on the defendant, you would arrest
23 him?

24 A Yes.

25 Q Take him into custody?

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1 A Yes.

2 Q And then you bring him back to the District
3 Justice Office?

4 A Yes.

5 Q And he would be arraigned and bail would be set?

6 A Yes.

7 Q And if he can't make bail he's put in jail?

8 A Yes.

9 Q That's what he was doing over there in jail when
10 this young man, Mr. Setzer, testified that he talked to my
11 client in jail; is that true?

12 A Right, yes.

13 Q He didn't meet bail?

14 A No, he did not.

15 MR. FINK: Officer, thank you very much.
16 Just a moment, please. Officer, I have nothing further.

17 THE COURT: Any redirect?

18 MR. LEBER: Couple questions.

19

20 REDIRECT EXAMINATION BY MR. LEBER:

21 Q One question Trooper Dawson, during the course of
22 your investigation did you determine Mr. Bailey's age?

23 A Yes, sir.

24 Q And what was it at the time that this incident
25 occurred?

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1 A 26 years of age, 26 years of age.

2 Q Mr. Fink asked about Mr. Bailey's cooperation with
3 the taking of the polygraph test. He indicated he was
4 willing to take the polygraph test?

5 A Yes, sir, originally he did.

6 Q What happened on the day that polygraph test was
7 scheduled relative to him taking the test?

8 A When it was scheduled time for them to be there,
9 Mr. Bailey stayed out in the vehicle, Miss Moore came into
10 the barracks and stated that Mr. Bailey had decided against
11 taking the test.

12 Q And did Mr. Bailey remain at the police barracks
13 at that point?

14 A No, sir, he left.

15 Q And he later returned?

16 A Yes, sir, he did.

17 Q And at that time decided that he would take the
18 polygraph test?

19 A Yes.

20 MR. LEBER: Nothing else, thank you.

21 THE COURT: Recross.

22

23 RECROSS EXAMINATION BY MR. FINK:

24 Q You're telling us now that my client and his
25 girlfriend or paramour initially came to the barracks, the

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1 paramour went in and told you that he decided not to take the
2 test?

3 A Yes.

4 Q Was the polygrapher already there at that time?

5 A I believe he was. If not, he was scheduled to
6 arrive very shortly.

7 Q What did you do, look out the window, see my
8 client in the car or something at that time?

9 A I believe I walked out and spoke to him at that
10 time.

11 Q What did you tell him at that time?

12 A Asked him if he was going to take the test or not
13 basically.

14 Q And what did he say?

15 A He said he decided not to.

16 Q Was that the end of that conversation?

17 A Basically. He left then in the vehicle and drove
18 into town.

19 Q How long was he gone?

20 A I don't know. I didn't maintain a vigilance at
21 the window to watch for his return.

22 Q Approximately. An hour?

23 A Approximately, I don't know.

24 Q Now, had the polygrapher come up solely for the
25 the purpose of giving my client the polygraph test?

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1 A No, sir.

2 Q He came up for other purposes?

3 A Yes, sir.

4 Q So he had to stay on station any way to perform
5 work for those other purposes which you've mentioned, right?

6 A Yes.

7 Q And then Mark and his girlfriend came back and
8 voluntarily came in and told you he changed his mind again.
9 What was said then?

10 A Mark didn't--the girlfriend did not depart with
11 Mark when he left, she remained at the barracks.

12 Q He told you he was then willing to take the test
13 or change his mind once again or what?

14 A Yes, sir, later in the afternoon he stated he
15 changed his mind and would take the test.

16 Q Do you have a record of this, the time he came in
17 the first time, when he left, when he came back in?

18 A No.

19 MR. FINK: Officer, thank you very much.

20 THE COURT: Thank you, Trooper, you may step
21 down.

22 MR. LEBER: Your Honor, the Commonwealth would
23 move for the admission of their exhibits 1 through 8.

24 MR. FINK: Your Honor, we have no objection.

25 THE COURT: Alright thank you very much all

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1 Commonwealth exhibits will be deemed admitted.

2 MR. LEBER: Your Honor, the Commonwealth
3 rests.

4 THE COURT: Thank you very much. Ladies and
5 gentlemen, the Commonwealth has concluded its portion of its
6 case-in-chief and we'll now be turning the floor over to Mr.
7 Fink on behalf of the defendant.

8 (Opening argument given by Mr. Fink).

9 MR. FINK: Thank you, Your Honor. Brother
10 Michael.

11 MR. LEBER: Your Honor, may I ask for an
12 offer on this witness, please.

13 (Following discussion held at the bench).

14 MR. FINK: Your Honor, this witness will
15 testify as to his observations and interrelationship between
16 the defendant and Rebecca and the defendant and his paramour
17 during the period of time in question. He will give
18 statements concerning his observations as to how they treated
19 each other, how Mark particularly treated this child and the
20 other children in or about the family.

21 MR. LEBER: Okay.

22

23 M I C H A E L H I C K S, having been duly sworn, was
24 examined and testified as follows:

25

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1 DIRECT EXAMINATION BY MR. FINK:

2 Q State your name, please?

3 A Michael Hicks, Brother Michael Hicks.

4 Q Brother Mike, that's how I know you, I hope you
5 don't mind?

6 A That's fine.

7 Q Why are you called Brother Michael?

8 A I'm a member of a religious order, Society of
9 Saint Gabriel and have been for 30 some years and because of
10 that when we take vows of poverty, chastity and obedience to
11 members of this community we take on the title of religious
12 brother.

13 Q Does that mean that you have a particular duty or
14 function within that religious sector or group?

15 A Yes, we have a responsibility to take on the
16 apostolic or the work of the society within the community,
17 the Catholic church community and within the order. Our
18 responsibility is to respond back to the community of the
19 work that we're doing within that community work. I am doing
20 it is at Saint Francis Parish in Bradford, Pennsylvania.

21 Q You used to be here in Coudersport, is that not
22 true?

23 A Maybe 17, 20 years ago, yes, Saint Eulalia's.

24 Q Been that long?

25 A Yep.

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3 1 Q Brother Michael, I ask you whether or not you know
2 my client?

3 A Yes, I've known Mark for maybe eight, ten years.

4 4 Q And do you know his mother who is seated here in
5 the courtroom?

6 A Yes, I've known her and family for the same amount
7 of time.

5 8 Q Have you had occasion to become acquainted with
9 the situation in which Mark chose to live from approximately
10 November of 1995 to the time he was arrested?

11 A Yes.

6 12 Q How did it come about that, Brother Michael, that
13 you became aware of his living situation?

14 A Because Mark before this time had lived in my home
15 in Bradford on 1 Oakland Avenue probably for five years
16 previous, six years previous to that.

7 17 Q Was that when you were living there also?

18 A Yes.

8 19 Q So I gather that Mark lived with you for that
20 period of time?

21 A Yes, to teach responsibilities, I rented him room
22 and facilities within the house. He didn't have full run of
23 the house yet he had full run of the house.

9 24 Q And within the frame work of the period of time
25 involved, where he lived with the mother of the child in

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1 question, who has been referred to as his paramour, namely
2 from November of 1995 until the time he was arrested how did
3 it come about that you were able to observe and become aware
4 of his living situation?

5 A Well, I was trying to help and I knew both Mark
6 and Lori from the time they met. Mark introduced Lori to me
7 and I was trying to help them put some sort of, maybe what we
8 would call a committment together. They would also come back
9 almost every weekend when they were over here in Coudersport
10 or living in Roulette, they would come over to my home almost
11 every weekend and would stay for the weekend being the fact
12 that we're only two houses away from his mother's house so it
13 was convenient and my house is large enough to hold them.

14 Q By they who do you mean?

15 A Lori and Mark mostly and sometimes the children
16 would come as well. Alot of times the children would come
17 along too.

18 Q Did you in fact during this period of time have
19 occasion to observe the interaction between Mark and Rebecca
20 after of course after Rebecca was born, which was February
21 1996?

22 A Yes, yes, I did, many times.

23 Q I wonder if you would be kind enough to inform the
24 jury as to your observations of the interaction between Mark
25 and Rebecca?

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1 A I believe I have seen a good rapport between Mark
2 and the baby. The caring, the gentleness, the concern about
3 this child's well being was evident. When the child cried,
4 Mark was on his way to pick up the child and to care for it,
5 to play with. As the child was progressing in age, dressing,
6 eating, being around. At the time we had two dogs in the
7 house making sure that there was safety there for that. A lot
8 of little intimacies that go on with--as adults should have
9 with a child.

3 10 Q Thank you. Brother Michael, did you additionally
11 observe any rapport between Mark and any of Rebecca's older
12 siblings, brother or sister?

13 A Yes, both of them because the whole family would
14 be there once in a while and there was good rapport. Alan
15 Michael, the young man who you heard from, a good guy,
16 growing up 8 years old had someone to play with and someone
17 to do things with and hang around with and looked on to Mark
18 as a, I feel, big brother so there was good rapport there, a
19 lot of horse play, few broken windows or things got broken,
20 but that happens. And with Rebecca's older sister, who was
21 always looking out the window, here comes Mark as she could
22 pronounce it, hands open up when he would come in. I know
23 I've heard the thing about the crying out and that when he
24 was around, and that didn't happen in Bradford to my
25 knowledge at all.

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4. 1 Q Brother Michael, did you, were you able to observe
2 during this period of time the rapport and relationship
3 between my client and Lori?

4 A Yes, I did.

5 5 Q And what were your observations in that regard?

6 A That's a struggle. That was a struggle sometimes.
7 There are, they had a lot of happy times, went and did
8 things, and had fun doing things with the children, going by
9 themselves, bowling, things like this. As a couple they had
10 struggles as they were starting to get to know each other,
11 and my personal opinion is that committment has to be built
12 up.

6 13 Q Based on your knowledge of Mark and observations
14 of Mark particularly as it relates to the interrelationship
15 between him and Lori and her children could you, do you have
16 any opinion as to whether Mark had formed any intent at any
17 time to harm the children?

18 A No. In my home there's children all the time,
19 being a piano teacher and music teacher they're in and out
20 for lessons, good rapport with those children. Always taken
21 an interest in them and taken an interest in that family and
22 looking forward to becoming a more solid family as the years
23 went along. There was no intention of hurting, if anything,
24 he'd probably bend over backwards to make sure they were
25 happy, and he did without, both of them, Lori and him did

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1 without to make sure the kids had what kids need.

2 MR. FINK: Cross-examine. Thank you very
3 much.

4 THE COURT: Mr. Leber.

5

6 CROSS-EXAMINATION BY MR. LEBER:

7 7 Q Brother Michael, you estimated that you knew Mr.
8 Bailey for eight or ten years; is that correct?

9 A Yes.

8 10 Q And five of those years he actually resided in
11 your home?

12 A Yes, maybe more.

9 13 Q Which five year time span was that? Can you
14 describe that for us?

15 A Probably, probably from the age of 19 or 20 on.

0 16 Q So I believe the testimony is he's 26 now 27 now?

17 A 27 now, right.

1 18 Q From the ages of approximately 19 until 24, 25
19 something like that?

20 A Hm-hmm.

2 21 Q So you've taken quite an interest in this young
22 man over the years; is that correct?

23 A Yes.

24 Q And any particular reason why you got together
25 with this young man or he found you?

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1 A Well, actually there is. I was probably more
2 friends with the whole family, with his younger brother I had
3 taught in school and his sister. They were up the street,
4 being by myself Martha cooks well, I stop up for supper,
5 coffee, something like that. So there was somebody there
6 being by myself it was alright.

4 7 Q So you would describe yourself as real good friend
8 of the Bailey's?

9 A Of the family, yes.

5 10 Q Now, when do you believe that the relationship
11 between Mr. Bailey and Lori Moore began?

12 A I'll tell you it began the summer before the
13 school year of 1995/96 because they were living--Mark had met
14 Lori and were on Washington Street right across from the
15 school where I taught so I waived and honked as I went home
16 from school.

6 17 Q So they were living together at that time in the
18 summer of 1995 that would have been?

19 A I believe so, yes.

7 20 Q And obviously Rebecca was not born at that time;
21 isn't that correct?

22 A No, Lori would have been expecting.

8 23 Q Now, in testimony apparently established that some
24 time in late '95, early '96 that Lori and Mr. Bailey did live
25 together, subsequently after Rebecca was born they were

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1 separated for a period of time. Did Mr. Bailey come back and
2 live with you at that time?

3 A Yes.

9 4 Q That would have been March to June of '96, perhaps
5 something in that ball park?

6 A You're close.

0 7 Q And then he moved back to Coudersport and lived
8 with Lori and her sister; is that correct?

9 A Right.

1 10 Q Now, during the time that Mark and Lori lived with
11 her sister here in Coudersport were you ever in their home?

12 A Yes.

2 13 Q How many times?

14 A Maybe, I won't say more than six, but not less
15 than four times I had been over, not for long periods of
16 time.

3 17 Q The testimony establishes that around the
18 beginning of September of 1996 that the couple lived in
19 Roulette--

20 A Yes.

4 21 Q --in an apartment down there or house down there
22 and they continued to do so up until this incident occurred
23 on September 24th. Did you visit with them in Roulette at
24 any time during that period?

25 A Yes, probably more times than Coudersport.

A-292

Q You talked about Lori and Mr. Bailey coming to visit you in Bradford on weekends--

A Yes.

Q --is that correct? First you said sometimes or alot of times the children would come along. Which was it sometimes or alot of times?

A Right I did say that. It's probably sometimes would be the best if we understand the same terminology.

Q And whenever you would visit this couple in Roulette or in Coudersport would that be on weekends or weekdays?

A Probably in the evenings on the weekdays since I was teaching during the day.

Q And during that period of time you observed good rapport between Mr. Bailey and the children?

A Yes.

Q You described the nature of the relationship between Mr. Bailey and Lori as to being, as to having struggles?

A Yes.

Q By struggles did you mean that there was anger and arguing between the two of them?

A At times, Hm-hmm.

Q And was that arguing sometimes very heated?

A Loud.

A-293

Q And was that arguing occurring in front of these children?

A More than likely not in my home.

Q How about in Roulette or Coudersport?

A I wasn't there when they were having any arguments. They might have had one and they weren't talking to each other, they were little disgusted what the other one might have been thinking, but I could think of the attitude on that but not any actual arguments.

Q Would you describe Mr. Bailey's nature of that of having a bad temper?

A A strong temper not a bad temper. I would not use the word bad.

Q What's the difference between a strong temper and a bad temper?

A Alright boisterous, persistent in what he's going to do, takes a lot of talking and clarification to get a point across especially if he's not feeling well. You know he has his medical problem, his acting up, making sure he understands and listens.

Q Were you aware, or is it true, do you know, as appeared in the tape recording that was played for the jury here that he was treated at Bradford Hospital because of his anger?

A I know he was in the Bradford Hospital. I don't

A-294

1 know if it was anger or depression, could have been or
2 Diabetes I'm not sure.

7 3 Q When was that?

4 A I'm not sure if it was earlier than his
5 introduction to Lori or within the first part of that, I
6 can't tell you.

8 7 Q Were you aware of whether he was taking any kind
8 of medication to control his anger?

9 A Yes.

9 10 Q And do you know what that medication was?

11 A No.

0 12 Q And do you know whether or not as he stated in the
13 taped interview that he quit taking that anger control
14 medicine?

15 A I didn't keep track of when he took his medicine.
16 I could tell, only thing I could really tell of his Diabetes
17 if his sugar was going down I could tell within his
18 conversation, his tone of voice, maybe like on this tape,
19 things like that. I can hear that because I'm accustomed to
20 that to him.

1 21 Q And again, you were aware that he was in fact
22 taking medication because of the problem of anger control?

23 A Yes.

2 24 Q So again your opinion is that he did not have a
25 bad temper just a strong temper?

A-295

1 A That's the way I personally would put it, yes.

2 Q Now, Mr. Bailey on this tape recording talked
3 about his relationship with Jodi Lynn Murray. Were you aware
4 of that relationship?

5 A Yes.

6 Q And he testified on here that he had struck her at
7 one time. Were you aware of that?

8 A I was aware of it. I did not see it.

9 Q He admitted that to you?

10 A I know about it because of reports that were made
11 of it and discussion between the two of them on it, yeah.

12 Q And on the tape again he indicated that he had
13 struck Lori on one occasion. Were you aware of that?

14 A That's, yes, the same as you've heard. I wasn't
15 present for the striking, but I know of it, yes.

16 Q Mr. Bailey tell you about that?

17 A We discussed the concept of hitting people, yes.

18 Q So were you counseling him because of his lack of
19 control of his temper?

20 A I wouldn't put it in the value of a formal
21 counseling, no, but as a friend as I would with any friend
22 and I strongly out speak my opinion of it, and I did when
23 we've been together, talking about situations, yes.

24 Q Did you feel a need as a friend and your church
25 connection with him to advise him he needed to work on

A-296

1 controlling his temper?

2 A Yes, we would work on it, yeah.

3 MR. LEBER: Thank you nothing else.

4 MR. FINK: Brother Michael, thank you very
5 much. I have nothing further at this time thank you.

6 THE COURT: Thank you very much, brother.
7 Ladies and gentlemen, it's just about noon. We'll take the
8 noon recess at this time until 1:00. During the recess again
9 don't discuss the case among yourselves or with anyone else.
10 I want you to avoid W F R M AM and FM. I don't know what,
11 if anything, is in the papers. The two that are potentially
12 around are the, three, Olean Times, the Bradford Era and the
13 Enterprise. I ask you to postpone your news from that and
14 any media sources. See you back here at 1:00. Court will
15 stand in recess until 1:00.

16 (Noon recess).

17 THE COURT: Welcome back. Turn the floor over
18 to Mr. Fink behalf of the defense.

19 MR. FINK: Call Martha Bailey please.

20
21 M A R T H A B A I L E Y, having been duly sworn, was
22 examined and testified as follows:

23

24 DIRECT EXAMINATION BY MR. FINK:

25 Q You are Martha Bailey; is that true?

A-297

1 A Yes.

2 Q Mrs. Bailey, what relation, if any, are you to my
3 client?

4 A I'm his mother.

5 Q How many children do you have?

6 A Four.

7 Q Mark is where in relation to the four children?

8 A The second.

9 Q Number two. Where do you live?

10 A Bradford.

11 Q How long have you lived there, Martha?

12 A Probably about 12 years.

13 Q Have you had occasion to observe your son, my
14 client, Mark, in an interrelation with Lori Moore and Rebecca
15 and Lori's other children?

16 A Yes, I did.

17 Q Between February of 1996 when Rebecca was born and
18 this date what opportunity have you had to see my client in
19 an interrelationship between him and Lori and her children?

20 A Well, Mark and Lori and the children came to my
21 home several times on mostly weekends and also in August of
22 '96 they visited us. We were on vacation camping at
23 Allegany State Park, and they came there to visit. They had
24 all three of the children with them at that time.

25 Q Where was that vacation?

A-298

1 A Well, we were camping at Allegany State Park by
2 Salamanca.

9 3 Q Allegany State Park?

4 A Yeah.

0 5 Q For how long a period was that?

6 A We were there for a week, but Mark and the
7 children had stopped like on the weekend, on I believe it was
8 a Sunday that they spent most of their time.

1 9 Q Based on the opportunities as you've described to
10 observe them as they interrelated with each other what would
11 you say about your observations as to the interrelationship
12 first of all between Mark and Lori's children?

13 A It was a very good relationship. They were real
14 happy with Mark, they called him dad most of the time.
15 Whenever they wanted something they asked him, whether it be
16 a sandwich or--this would be mostly Michael and Jennifer they
17 were older of course, and whatever they wanted he took care
18 of what they wanted.

2 19 Q What would you say about your observations as it
20 related to Mark's concern over the welfare of the children?

21 A He loved those children.

3 22 Q Tell the jury what you saw which made you believe
23 that?

24 A Well, one incident.

4 25 Q Or what you heard, what you saw or heard?

A-299

1 A One incident I saw was while we were at camp we
2 had always set on the picnic benches. We were inside the
3 cabin, which had a cement floor at the time and Jennifer fell
4 backwards and bumped the back of her head. Lori and Mark
5 were both sitting side by side. Lori did not get up at all.
6 Jennifer put her hands toward Mark for him to pick her up.
7 He picked her up and held her and covered her until she was
8 alright, until she quit crying. He held her the whole time.
9 Later the same day, most the time Rebecca the littlest one
10 she was either in say stroller, in a car seat the entire
11 time. I did not one time see Lori take her out to change her
12 diaper. She, Lori, did attempt one time to feed her. She
13 started to cry and Lori said, well I'm just not going to
14 bother right now and whatever I don't know what the food was,
15 but it was in a little baby food jar. Mark went over, he got
16 the spoon and he set there and the baby did eat quite a bit
17 compared what he had, what she had when her mother had tried.

5 Q What have been your observation concerning the
18 relationship between Mark and Lori since you've had an
19 opportunity to observe them?
20

21 A Well, most of the time they seem to get along when
22 I saw them. I didn't really see anything that said they
23 wouldn't have.

5 Q Have you ever seen Mark harm, physically harm any
24 child?
25

A-300

1 A Never, and I have nine sisters and one brother and
2 between the nieces and nephews and great nieces and nephews
3 they count 100 and we get together every year for family
4 reunion. We've never had any problem whatsoever and all the
5 kids love Mark, and if he is not right there they want to
6 know where he's at because they know that if they want to go
7 for a ride or they want to play a game or whatever Mark will
8 be there for them, and Mark has been that way since he was
9 very young.

7 Q Based on your observations and of course on the
10 historic knowledge of your son, do you, what do you have to
11 say about Mark's propensity to place any child in danger or
12 hurt any child?
13

14 A He would not.

8 Q You're saying that under oath?

16 A Yes, yes, sir, I am.

17 THE COURT: Cross-examine.

18

19 CROSS-EXAMINATION BY MR. LEBER:

9 Q Does your son have problems controlling his anger?

21 A It's not so much it's anger. He does have
22 problems with his Diabetes and sometimes his sugar gets too
23 high or his sugar gets too low and that either one or the
24 other can cause him to have problems more so if the sugar is
25 high. He does sometimes get agitated if it gets too low,

A-301

1 anybody that knows about low blood sugar. He has passed
2 right out from low blood sugar.

0 3 Q The blood sugar doesn't cause him to be angry or
4 violent?

5 A If his blood sugar gets high, it just, I would say
6 maybe be irritated.

1 7 Q If his blood sugar is high he might be irritated?

8 A Yes.

2 9 Q Irritated meaning he doesn't have much patience?

10 A Well, because his sugar is out of control.

3 11 Q So he's been treating right along with insulin for
12 his Diabetes problem; is that correct?

13 A He has been, but he has had problems with it being
14 too high and he has had problems being too low, where he's
15 been taken to the emergency room because of mostly the low
16 blood sugar is when he passes out. So that's when he's had
17 to have ambulance called for him because.

4 18 Q So other than the fact that he has this problem
19 with Diabetes you don't think there is anything that causes
20 him to be angry or violent?

21 A No, I've never seen him violent.

5 22 Q But you know he has been violent; don't you?

23 A Not violent, no.

6 24 Q You know he hit his girlfriend?

25 A I do not know for certain because I did not see

A-302

1 that.

2 Q Did Mark tell you he did?

3 A I don't recall if he did or not.

4 Q Did he tell you he hit Lori?

5 A No.

6 Q So you don't know about that?

7 A And Lori did not tell me either if it happened.

8 Q Now, you indicated that you believe that his
9 problems stem from his Diabetes, but you are aware that he
10 has been treated for his problems with controlling his anger;
11 are you not?

12 A Well, when he was hospitalized one time, and I'm
13 not sure of the date myself, but as soon as he was in the
14 hospital and had his diabetic needs taken care of he was
15 alright..

16 Q What hospital was he in?

17 A Bradford Hospital.

18 Q What section of the hospital was he in?

19 A Well they put him on the Psych unit.

20 Q On the Psych unit?

21 A Just for only just a couple days.

22 Q To your knowledge do they basically put people
23 with Diabetes in the Psych unit?

24 A I don't know how they run.

25 Q Was he taking any other medication other than that

A-303

1 for his Diabetes if you know?

2 A Pardon me?

6 3 Q Was he taking any other medication other than the
4 medication for his Diabetes?

5 A I don't really know.

7 6 Q Does the drug Tofranil mean anything to you?

7 A I don't really know anything about that drug.
8 I've heard the name, that's all.

8 9 Q When was it when he was in the Psychiatric Ward at
10 the Bradford Hospital, the date that he was in there,
11 approximately when was it?

12 A I think it might have been in '95, the Summer of
13 '95.

14 Q And what was the incident that precipitated that?
15 Why did he end up in the Psych ward, what happened to cause
16 that?

17 A I really don't know other than the fact that there
18 was, he was like had been with one girl and then Lori became
19 involved in a situation and it caused problems, and that's
20 caused problems between Mark and Lori I would imagine between
21 the three of them.

0 22 Q So there were two woman involved with your son at
23 the same time?

24 A I don't know it was at the same time. He broke up
25 with one and went with Lori.

A-304

1 Q And this other person was Jodi?

2 A Yes.

3 Q Now, you indicated that relative to the
4 relationship between Mark and Lori that most of the time they
5 get along?

6 A Well, they did when I saw them. I didn't see them
7 a lot. Like I said, only on the weekends, usually Saturday.
8 I was at work if they come by on weekend and then they stayed
9 down the street at Brother Michael Hicks' home. They did come
10 up to my house, they'd bring the children up, they'd eat.

11 Q So as far as you know whenever you saw them they
12 seemed to get along?

13 A Yes.

14 Q And obviously that means there were a lot of times
15 whenever you didn't see them; is that correct?

16 A Well, I can't speak for why I didn't see them.

17 Q You don't really know how they got along when you
18 weren't present?

19 A That's right.

20 Q Again, your son you've attributed this to Diabetes
21 but what have you observed in terms of his anger, what does
22 he do? For instance, does he smash windshields on his
23 vehicles?

24 A Well, he would rather smash a windshield or a
25 window than to hurt somebody.

A-305

Q So he's done that?

A Yes, he has.

Q How many times?

A I don't know.

Q More than once?

A I don't know how many times.

Q Do you know whether it was more than once or not?

A I do not know. I do know he did once.

Q What did he smash the windshield with?

A I don't know. I don't know. I didn't see it. I saw the windshield after the fact.

Q Whose vehicle was it that he smashed the windshield on?

A I don't know if it was his own vehicle or one he was driving.

Q When was that?

A I don't know when it was. I have no idea.

Q Do you know why he smashed the windshield on his vehicle?

A No, I don't.

Q Did he admit to you that he smashed the windshield on the vehicle?

A I don't know. It was not my responsibility for the windshield so I wasn't concerned about the windshield because--

A-306

1 Q My question was did he admit to you that he had
2 smashed the windshield on the window?

3 MR. FINK: Your Honor, I think that's been
4 asked and answered, she doesn't know, she wasn't there.

5 THE COURT: I believe the answer has been she
6 doesn't know; is that correct?

7 A Yes, sir.

8 MR. LEBER: Nothing else of Mrs. Bailey.

9 MR. FINK: I have no redirect, thank you.

10 Going to call Mark Bailey, the defendant,
11 please.

12
13 M A R K B A I L E Y, having been duly sworn, was examined
14 and testified as follows:

15
16 DIRECT EXAMINATION BY MR. FINK:

7 17 Q Mark, in answering my questions I'm going to ask
18 you to talk to the jury because I want to make sure they
19 hear. Okay?

20 A Okay.

8 21 Q You are Mark Bailey, you're the defendant in this
22 matter; is that true?

23 A Yes.

9 24 Q Mark, how old are you?

25 A 27.

A-307

0 1 Q What's your education? Did you graduate from high
2 school?

3 A No.

1 4 Q How far did you go in high school?

5 A Tenth grade.

2 6 Q Can you read and write?

7 A Yes.

3 8 Q How come you quit in tenth grade?

9 A I don't know. I just thought I was 18 and I could
10 just go.

4 11 Q Okay. Mark, after you quit, did you go to work?

12 A Shortly after, yes.

5 13 Q Okay. What has been your work history, please
14 since you quit high school in tenth grade?

15 A I've worked in grocery stores.

6 16 Q What did you do in grocery stores?

17 A I was stock boy. I'd help people carry out their
18 groceries.

7 19 Q Where was that do you know?

20 A That was Bells Supermarket in Bradford. I worked
21 at Burger King in Bradford and then I did some like private
22 work cutting fire wood with a friend of mine. I've worked in
23 factories and at the present time I'm working at a pizza shop
24 delivering pizzas.

8 25 Q Where?

A-308

1 A In a pizza shop delivering pizzas.

2 Q Mark, I guess I would like to ask you where you
3 now live?

4 A Right now I'm staying in Duke Center, 714 Main
5 Street, P.O. Box 197.

6 Q 714 Main Street where?

7 A Duke Center, PA.

8 Q You live alone?

9 A No, Michael Hicks owns the place and he is staying
10 there too. I'm just there temporary until I can get on my
11 feet again and get my own place.

12 Q Where did you live before that Mark?

13 A Roulette.

14 Q And is that when you were with Lori?

15 A Yes.

16 Q Did there come a point in time when you and Lori
17 no longer lived together?

18 A Yes.

19 Q When was that?

20 A When I got put in Potter County Jail.

21 Q Okay now let's go back. Did there in fact come a
22 time when you and Lori Moore began to live together?

23 A Yes, we first started living together in, I guess,
24 it would be, it was July of '95.

25 Q July of '95 and was that in Coudersport?

A-309

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3 now live?

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5 Street, P.O. Box 197.

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22 time when you and Lori Moore began to live together?

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24 it would be, it was July of '95.

25 Q July of '95 and was that in Coudersport?

A-309

1 A No, sir.

2 Q Where was that?

3 A Bradford.

4 Q Bradford. In whose name was the apartment at that
5 time?

6 A Jeff and Ryan Patterson.

7 Q Who was living in the home at that time?

8 A Jeff, and his wife, their children, me, Lori,
9 Jennifer and Alan and then Jeff's brother and his girlfriend
10 was renting the basement.

11 Q Now, Jennifer and Alan are children of Miss Lori
12 Moore, right?

13 A Yes.

14 Q Were you aware at that time of how many children
15 Lori had?

16 A Yes.

17 Q How many were you aware that she had at that time?

18 A I was aware that she had two living with her and
19 one that was living with its father.

20 Q Did she ever tell you whether they were fathered
21 by the same or different people?

22 A No, she didn't.

23 Q How did you get along with Lori's children at that
24 time when you first started to live with her?

25 A We got along good. Alan was glad to have somebody

A-310

1 around that would do stuff with him and acknowledge that he
2 was there.

6 3 Q Okay. Did there come a point in time when you
4 moved from Bradford to another place in another town with
5 Lori?

6 A Yes.

7 7 Q Where and when was that?

8 A It was Coudersport and it was just before she had
9 Rebecca. As her pregnancy got closer to the ninth month, I
10 started staying in Coudersport so I would be there to take
11 her to the hospital.

8 12 Q What, if any, physical and or emotional problems
13 were you treating for at the time you moved with Lori to
14 Coudersport, if anything?

15 A Diabetes and the doctor had me on medication.

9 16 Q Let's talk about your Diabetes a little bit.
17 Diabetes is a disease that needs an artificial control of
18 insulin; is that true basically?

19 A Yes.

0 20 Q How long had you been suffering as far as you know
21 from Diabetes?

22 A Up until I met Lori.

1 23 Q Going back from birth from whatever?

24 A I got diagnosed with Diabetes when I was 13.

2 25 Q 13?

A-311

1 A Yes.

2 Q And when Diabetes was first diagnosed did you
3 receive treatment for Diabetes at that time?

4 A Yes.

5 Q And what kind of treatment did you get?

6 A Was put on insulin shots.

7 Q Shots?

8 A Yes.

9 Q How often?

10 A Twice a day.

11 Q Did you use those yourself?

12 A Yes.

13 Q And was that still the case when you and Lori
14 first got together?

15 A Yes.

16 Q What were your symptoms if the Diabetes were not
17 properly controlled?

18 A If like if my blood sugar was high, I'd get
19 agitated and just wouldn't really have any reason.

20 Q If your sugar was high--

21 MR. LEBER: I'm just going to point out that,
22 Mr. Fink, your client was answering the question while you
23 were talking at the same time.

24 Q I didn't mean to interrupt.

25 A When it's high, I get agitated rather easily than

A-312

1 if it was in control, and if it's low I get shaky, I can't
2 really navigate that way. My speech gets slurred and if it
3 goes beyond that point, I don't do nothing about it I found
4 out that it can make you pass out.

2 5 Q Have you passed out before because of low blood
6 sugar?

7 A Yes, sir, I did October 8th of this past year I
8 was driving to my mom's to get something for my sugar because
9 my brother saw me downtown, told me to get to my mother's. I
10 did, went right by my mom's house right by three convenient
11 stores going out East Main Street in Bradford. I passed out,
12 hit a telephone pole and wrecked my car.

3 13 Q How many times have you passed out because of
14 blood sugar?

15 A Got to be close to seven or eight, and that's I'd
16 say last three or four years.

4 17 Q What do you do about high blood sugar? Is that
18 when you take insulin or did you take candy what do you do?

19 A When your blood sugar is high, like there's
20 designated times take your insulin. For me, for example,
21 it's in the morning. I get up, take my shot, eat breakfast,
22 go through the day. At dinner time, take my shot, eat
23 dinner. If it's after I've already had it, only thing I can
24 do is exercise.

5 25 Q During these periods of high and low blood sugar

A-313

1 other than when you pass out are you able to maintain
2 consciousness or understanding of basically what you're
3 doing?

4 A Yes.

5 Q Okay. Now, when you moved from Bradford to
6 Coudersport with Lori were you working?

7 A No.

8 Q Was she working?

9 A No.

10 Q Did there come a point in time when you lived in
11 Coudersport that you went to work?

12 A Yes.

13 Q Where did you go to work when you were living in
14 Coudersport?

15 A Emporium Specialties in Austin.

16 Q And did Lori work at that time also?

17 A No.

18 Q Now who was living with you and Lori when you
19 moved to Coudersport?

20 A It was me, Lori, her children and her sister,
21 Tammy and her brother, Mike and Tammy's daughter, Tiffany.

22 Q How about Alan and Jennifer?

23 A Yes, they were there too.

24 Q Was Children and Youth Services involved with
25 Lori's children at all do you know?

A-314

1 A I know of one count in McKean County where she had
2 a run in with them. I don't know the extent of it.

4 3 Q Now, did there come a time when she became
4 pregnant in or about February of 1996; is that true?

5 A Yes.

5 6 Q She was pregnant and gave birth to a child?

7 A Yes.

6 8 Q You had been with her approximately 7 months
9 before the birth of that child; is that right?

10 A About that, yes.

7 11 Q You took Lori to the hospital to give birth to
12 that child?

13 A Yes.

14 Q Now, after she came back from the birth of the
15 child, brought the child with her was anybody different than
16 what you've mentioned living in the house in Coudersport or
17 the apartment, whatever it was?

18 A No.

9 19 Q Same people?

20 A Yes.

0 21 Q Plus a new arrival?

22 A Yes.

1 23 Q Now Lori was not working at this time, right?

24 A Correct.

2 25 Q And were you working at the time of the birth of

A-315

1 the new arrival?

2 A No.

3 Q You were not?

4 A No.

5 Q Did there come a point in time when you again
6 became employed after February of '96?

7 A Yes, it was June.

8 Q In June?

9 A Yes.

10 Q And you worked where then?

11 A Emporium Specialties.

12 Q Now, was Lori working at that time?

13 A No.

14 Q So from the birth of the child in February '96
15 through June at least when you became re-employed she was not
16 working?

17 A No, sir, she wasn't.

18 Q Was she home all the time as far as you know?

19 A Yes.

20 Q Now, when you went to work for Emporium
21 Specialties in June of '96 what shift did you have?

22 A First shift, I worked 7 to 3.

23 Q 7 to 3?

24 A Yes.

25 Q And that is in Emporium, Pennsylvania?

A-316

1 A Austin, Pennsylvania.

2 Q I'm sorry Austin. Lori testified that she would
3 consider herself to be the primary care taker of the child,
4 would you agree with that?

5 A Yes.

4 6 Q What, if anything, did you do toward the care of
7 the child from the date Lori brought her back from the
8 hospital to say June when you became employed?

9 A Well, I was around. I would help any way I
10 could. There was a time after Rebecca came home that I did
11 move back to Bradford.

5 12 Q Did you change diapers?

13 A Yeah, I've changed a few of them.

14 Q Did you feed her?

15 A Yes.

7 16 Q Did you play with her?

17 A Yes.

8 18 Q When she would cry, were there times when you
19 would go to her as opposed to the mother or anybody else?

20 A Yes.

9 21 Q Now, did there come a point in time before you
22 moved from Coudersport that Lori became employed?

23 A No.

0 24 Q So from birth of the child right up until
25 September of 1996 Lori was not employed?

A-317

1 A Correct.

2 Q Was she home all day as far as you knew?

3 A Yes, as far as I knew she was home all day or
4 unless she had to go to the store or up to where her sister
5 works to see her.

6 Q Let me get this straight and for the purpose of
7 answering this question I would like to have you consider
8 everybody over 18 years of age as adults. How many adults
9 were living in that house other than you and Lori between
10 February of '96 and September of--and the time you moved to
11 Roulette, how many adults persons?

12 A Two.

13 Q And were either of them working?

14 A Yes, I believe they both were.

15 Q So after you went to work the only adult in the
16 house was Lori?

17 A Yes.

18 Q When you were working?

19 A Yes.

20 Q Okay. Now, before you moved, you and Lori moved to
21 Roulette were you ever aware that Lori was injured, not Lori
22 I'm sorry Rebecca?

23 A No.

24 Q Did you ever see any discoloration on her body or
25 ever have any reason to believe that she had been injured by

A-318

1 anything?

2 A No, only time I will see a bruise is when Lori
3 would show me that she had one, that was normally either
4 before she put her in the bath tub or brought her out to get
5 her dressed.

8 6 Q Did you ever see, for instance, an injury or a
7 mark on the rib cage?

8 A I don't recall that I have.

9 9 Q Did you ever see any discoloration of the shin
10 bone or tibia on either leg?

11 A On the right leg I did.

0 12 Q When was that?

13 A September of '96.

14 Q Before that had you seen anything?

15 A No.

2 16 Q Nothing. Now, you moved to Roulette and when you
17 moved to Roulette did you retain your job?

18 A Yes.

3 19 Q Working at Emporium Specialties in Austin?

20 A Yes.

4 21 Q Did Lori get a job after you moved to Roulette?

22 A No.

5 23 Q While you were together?

24 A No.

6 25 Q Now, I guess I'd like to ask you about your

A-319

1 relationship as far as you were concerned with the three of
2 Lori's children that were with you, that were with her. How
3 do you feel that you got along with them?

4 A I feel I got along great with them. I loved them
5 as if they were my own.

6 Q How did you get along with the other two, Jamie
7 and Jennifer?

8 A Jamie?

9 Q The boy and Jennifer?

10 A Alan.

11 Q Alan and Jennifer?

12 A Me and Alan got along good. Me and Jennifer she
13 was kind of shy of me for a while.

14 Q I thought that Alan kind of testified that you
15 didn't get along too well or something. Do you have any
16 explanation for that?

17 A No, I don't.

18 Q Tell the jury about couple of things that come to
19 your mind and how you and Alan got along?

20 A Well, I got a C B in my car and Alan he thought it
21 was really neat and he kept asking if he could talk on it and
22 stuff. I said you're too little for it yet, but I figured
23 what's it gonna hurt. So he got on it and by luck he got on
24 that one day sitting in front of Tammy's and there was
25 another little boy talking on his dad's radio. They talked

A-320

1 for five, ten minutes. Alan thought it was neat. Every time
2 me and Alan would get in the car I would have to turn C B on
3 so he could either hear other people talking to do something
4 with him. It was really neat, this is cool, I got somebody
5 to play with, somebody I can do things with, somebody to take
6 me places.

2 7 Q Did you have much relationship, if any, with
8 Jennifer?

9 A In the beginning I didn't. She went to Geisinger
10 to have a penny removed from her throat and after we come
11 back from that it was like she was attached to me, and there
12 was, there was like a bond for me and Jen.

3 13 Q When was the first time that it was brought to
14 your attention after you moved to Roulette that Rebecca had
15 injured her foot or ankle? How was it brought to your
16 attention?

17 A I was in bed sleeping and Lori was up with the
18 kids and Alan and Jennifer and Rebecca were out in the living
19 room, which was outside our bedroom door, and Lori came in to
20 wake me up, kids were out there and Rebecca was crying and
21 she asked what was wrong, and that's when Alan had said that
22 Jennifer fell on Rebecca's leg, and then it was not too long
23 after that that Lori brought Rebecca in and showed me that
24 her leg was bruised.

4 25 Q Were you aware that there came a time when Rebecca

A-321

1 was taken to the hospital in reference to that apparent
2 injury?

3 A Yes.

4 Q Did you go there?

5 A Yes, I did.

6 Q What, if any, discussion did you have with
7 Rebecca's mother, Lori, concerning that apparent injury, what
8 discussion did you have, if any?

9 A I don't recall.

10 Q Were you concerned over Rebecca's welfare?

11 A Yes, I was.

12 Q At that time did you think that you were
13 responsible for or may have been responsible for that?

14 A No.

15 Q I understand that you went first of all to Dr.
16 Asar?

17 A Yes.

18 Q And she was just leaving so she referred you to
19 the hospital; is that true?

20 A Yes.

21 Q What were you aware of that happened at the
22 hospital, to the best of your recollection tell the jury just
23 exactly what you were aware of?

24 A I didn't know what was wrong.

25 Q Were you aware, for instance, that child was

A-322

1 treated in the Emergency Room?

2 A Yeah, I was aware of that.

3 Q Did you talk to Dr. Supinski at that time?

4 A Briefly, he come in and explained about the cast
5 that he was putting on Rebecca's leg.

6 Q Now, did you or were you with Lori when the child
7 was brought home from the hospital?

8 A When? After?

9 Q When Rebecca was brought home from the hospital
10 after September 24?

11 A No, Rebecca didn't come back home.

12 Q Did Rebecca return with her mother from the
13 hospital?

14 A No, she didn't.

15 Q Do you know why that was?

16 A They said that she had fractures and that they
17 were taking her into their custody.

18 Q Who was?

19 A Children and Youth Services.

20 Q Children and Youth Services took the child into
21 the custody of that service at that time; is that right?

22 A Yes, after everything was done with Rebecca they
23 took her with them.

24 Q Do you know whether Rebecca was ever returned to
25 the custody of her mother as of this date?

A-323

1 A Only on weekends.

2 Q After September 24, 1996 did you become, do you
3 recall whether or not you were contacted by any police
4 officer?

5 A Yes.

6 Q How long after September 24th were you contacted?

7 A I don't recall.

8 Q My recollection was that there was testimony that
9 in October the arresting officer first contacted you and
10 asked you to come to the barracks, would your recollection
11 disagree with that?

12 A No.

13 Q Do you remember the contact?

14 A I believe it was by telephone.

15 Q By telephone. And the arresting officer who sits
16 at counsel table called you by the phone on the phone?

17 A Yes.

18 Q What did he say to you?

19 A He just asked for me to and Lori to go up and give
20 him a statement about what happened.

21 Q Okay. He didn't ask you to come to the barracks
22 for an interview at that time or anything?

23 A Not that I recall.

24 Q Do you recall the next contact he had with you?

25 A No, I don't.

A-324

Q Do you need a lifesaver or something, any sugar?

A No, I'm fine.

Q Do you remember being asked to go to the police barracks in Coudersport?

A Yes.

Q Do you know who it was that asked you to do that?

A Trooper Dawson.

Q And do you remember when that was approximately?

A No, I don't.

Q And did you go to the barracks at his request?

A Yes.

Q Did he tell you before you went why he was asking you to go to the barracks?

A For I believe he stated as a statement for what happened with Rebecca.

Q Okay. And did he interview you at the barracks at that time?

A Yes, there was an occasion, I believe, that one that he interviewed me and Lori both.

Q Did he ask you anything about what you knew about Lori's injury or injuries on the first time you went to the barracks?

A Yes, I believe he did.

Q What did you tell him if you can recall?

A I don't recall what I told him.

A-325

1 Q Now, do you remember whether or not at the first
2 time you went to the police barracks that you had any feeling
3 that you had contributed in any way to any injury of Rebecca?

4 A No.

5 Q Do you recall after that there came a time when
6 you were asked to again go to the barracks for the purpose of
7 taking a polygraph test?

8 A Yes.

9 Q Who was it that asked you?

10 A Trooper Dawson.

11 Q And what method of communication by letter, by
12 phone or did he come to your house?

13 A Telephone.

14 Q What was your response?

15 A I told him, yes.

16 Q Did you know what a polygraph test was?

17 A Sort of. I didn't know the full extent of it.

18 Q Did you know whether or not it could be used, the
19 results could be used in court?

20 A No, I did not.

21 Q Did you know that there was a special operator
22 that had to operate a machine that was hooked up to you?

23 A I didn't know it had to be a special operator. I
24 just knew the only one that was closest was the gentleman
25 that he had told me about.

A-326

Q And was there subsequently a time again when he called you, they were ready to give you the polygraph test?

A Yes, it was a couple weeks before.

Q A couple weeks before the test?

A Around the first of February he called to see if we were still going to take the test and that way he could call the guy back and schedule the date.

Q February of '97?

A Yes.

Q This year?

A Yes.

Q Okay. Did you go to the barracks on the appointed day to take the polygraph test?

A Yes.

Q Up to the time that you actually went to the barracks were you told anything about the test?

A No, I wasn't.

Q You and Officer Dawson agree on that. When you got there what happened?

A Well, prior to that, going up to take the test I was advised, me and Lori both were advised by a public defender from Wellsboro, I believe his name was Walrath, not to take the test for anybody unless we had an attorney present and that's when I decided that I was going to wait to see if I could get an attorney.

A-327

3 1 Q You were advised by Attorney Tom Walrath,
2 Assistant Public Defender in Wellsboro, Assistant Public
3 Defender for Potter County that you should not take the test?

4 A Yes, unless I had an attorney with me.

4 5 Q Unless you had an attorney with you. Did he
6 volunteer to go with you?

7 A No.

5 8 Q So that's why you went and told them you wouldn't
9 take the test?

10 A Correct.

6 11 Q Then what happened?

12 A The day of the test I took Lori up and she went
13 in, and I wasn't going to until I could contact an attorney,
14 and Trooper Dawson come out after I returned. I did leave, I
15 took Lori's brother, Mike, and daughter, Jen, we went to
16 McDonalds for lunch and went back up, and he came out to the
17 car and told me that his boss wanted to talk to me, and he
18 said it would only take a couple minutes.

7 19 Q Who said this?

20 A Trooper Dawson.

8 21 Q He asked you to come in, talk to him, it would
22 only take a couple minutes?

23 A Yes, he wanted me to come talk to his boss.

9 24 Q Did you go in and talk to him?

25 A Yes.

A-328

Q What did he say?

A They discussed the case about Rebecca and at that time I knew that I basically walked into a trap because if I didn't either take the test or answer the questions I wasn't going to get back out that door and that's how I felt, and we got talking and Trooper Dawson and Sergeant Shirley both told me most likely if I admitted to this the D A would only give me a fine.

Q Both Trooper Dawson and Sergeant Shirley told you that most probably if you what?

A If I admitted to this, these charges, that I would most likely just get a fine out of it.

Q Okay. Now, was this before you went in to talk to the polygrapher, the man who testified yesterday that gives the polygraph test?

A Yes, because he was giving the polygraph test and I was in Sergeant Shirley's office, and then we was in the kitchen area of the State Police Barracks and that's where I was told that.

Q Now, after that did you go into talk to the polygrapher, the person giving the polygraph test?

A Shortly after that, yes, I did.

Q And did you basically tell him what you later told Trooper Dawson that was on that recording that we heard?

A Yes, I did.

A - 329

5 1 Q I'm going to refer to that recording and ask you
2 some questions about it. When you were asked by Trooper
3 Dawson, could you tell us what may, could you tell us what
4 may happen that would have caused that particular injury to
5 Rebecca, talking about her broken right leg, necessitating
6 the trip to the doctor on September 24th. You said I was
7 holding her up above my head in one hand, playing around with
8 her, she started to fall so I grabbed her leg and caught her
9 with my other arm and pulled her into my chest so she
10 wouldn't hit the floor. Did that actually happen?

11 A Yes, sir, that did actually happen.

6 12 Q And what made you think of that incident when he
13 asked you that? Did you at that time think that may have
14 caused the injury?

15 A Yes, at that time, I did, I felt that might have.

7 16 Q Had you thought about that before? Had you
17 thought about that incident that may have caused the injury
18 before that?

19 A Not that I recall.

8 20 Q Dawson then asked you, "Okay sounded like it was
21 an accidental thing, is that correct"? And you said, "Yeah."
22 It was pointed out to you by Trooper Dawson in that interview
23 that it was learned when Rebecca was taken to the doctor that
24 in addition to the right ankle injury she also sustained leg
25 and rib injuries, breaks and you were asked, "Do you have any

A-330

1 idea, can you tell us what may have caused those injuries?"
2 You said in answer to that you said, "Being upset, picked her
3 up too hard." And then you're talking about picking her up
4 and you may have picked her up too hard to injure her ribs.
5 Did that actually happen?

6 A Not that I recall. I just, I was just answering
7 questions that he asked me.

8 Q You were asked by Trooper Dawson, "and what were
9 the circumstances surrounding picking her up like that?" You
10 say, "At Tammy Baker's house in Coudersport."

11 Q Dawson, "Okay, was there anything going on with
12 Rebecca that may have caused you to be upset?"

13 A "Not with Rebecca herself, she was crying. I was
14 already upset I should of just stayed away." Question,
15 "Where was Rebecca?" Answer, "In the crib." Question, "Is
16 it a separate bedroom?" Answer, "No, same room." Question by
17 Dawson, "Could you describe to us how it was that you picked
18 her up?" Answer, "Well, I picked her up, I picked her up like
19 you would normally pick up a child, but with me being angry I
20 probably squeezed just a little too tight." Do you remember
21 squeezing just a little bit too tight?

22 A I really can't answer that because I wouldn't know
23 how.

24 Q Why did you say that at that time?

25 A I was scared.

A-331

2 1 Q Let me digress for a minute. Tell me about your
2 condition when you appeared for the interview with Trooper
3 Dawson did you have a broken arm then?

4 A Yes, I did.

5 Q When did you break your arm about do you know?

6 A February.

7 Q February of '97?

8 A Yes.

9 Q And how was it taken care of?

10 A By Dr. Supinski.

11 Q Was it in a cast or sling or what?

12 A No, he just had it in a splint.

13 Q Other than being scared was there any other
14 problem that you were experiencing at that time?

15 A From being nervous my blood sugar was fluctuating.
16 I was on 500 milligrams of painkiller for my arm.

17 Q Now, after talking about you probably squeezed
18 just a little too tight, Dawson said, "Do you think it's
19 possible as a result of that the injury to the rib could have
20 taken place?" And you say, "Yeah." Dawson, "How about the
21 other two prior two injuries to her leg can you tell us how
22 you think they may have happened?" You said. "Yeah, one of
23 them may have happened when I dragged her out of the car. I
24 was upset, bad day. Instead of being easy I just grabbed the
25 car seat and her leg was up against the car seat when I

A-332

1 grabbed it, and I just grabbed and pulled the car seat out so
2 I could get her out of the car and get her into the house and
3 that was apparently the result of another injury." Now did
4 that actually happen that you remember picking her and the
5 car seat out of the car?

6 A There was one time when I took her out of the car
7 that her foot got caught on the seat belt for the front seat.

8 Q Let's go into that and find out exactly what you
9 did. Where is the car seat? In the front or back?

10 A In the back seat.

11 Q In back seat. And is she strapped into the car
12 seat?

13 A Yes, it was.

14 Q And the car seat was it attached to the back of
15 the back seat over the back or how?

16 A It was--when we take her and Jennifer both in and
17 out of the car we take the car seats in the house with us and
18 she--I bent to take her out she was in the car seat. I was
19 grabbing the car seat to take her and the car seat both out.

20 Q So she was in the car seat?

21 A Yes, she was still buckled into the car seat
22 itself.

23 Q You were picking her and the car seat out of the
24 car?

25 A Yes.

A-333

4 1 Q How did you figure that might have hurt her?

2 A I don't know.

5 3 Q Okay. Do you remember whether or not she evidenced
4 any pain when you did that? Did she cry do you remember?

5 A I do not remember.

6 6 Q Now, Dawson asked you immediately after that, "Had
7 something taken place in the car that maybe caused you to be
8 upset at that point?" And you said, "Jennifer had got sick
9 and was fussing and that didn't help me out any of being of
10 sound mind." Do you remember that?

11 A Somewhat, yeah, I remember.

7 12 Q Jennifer getting sick, did she throw up?

13 A Yeah, big time.

14 8 Q Okay. Dawson question, so far you've talked about
15 two leg injuries and one rib injury there's still another leg
16 injury that perhaps you would know something about is that
17 also correct?" And you say, "Yes." Dawson, "Can you tell us
18 anything?" It could have happened when I went to pick her up
19 out of the crib, her leg was between the bars and I picked
20 her up, and when I picked her up her leg got caught and I
21 mean it vibrated the whole crib, and that apparently was
22 another result of a fracture." Did that actually happen?

23 A Yeah, there was a time that I did pick her up out
24 of the crib, and I don't know if it was her foot or her knee
25 that hit, but it did, it was an old crib. It shook a little

A-334

1 bit, but I didn't think it would cause any injury. She was
2 fussy when I picked her up. She didn't fuss any more or any
3 less.

9 4 Q Why did you tell the police officer that these
5 particular incidents may probably or whatever you said
6 probably resulted in the injuries, can you tell us?

7 A I was basically going by what they told me before
8 the interview that if I admitted to it I'd get a fine, and I
9 figured that way everything is over, I won't--nobody will
10 have the harassment any more.

10 11 Q Okay. Now, can you remember when you were arrested
12 after you were interrogated by Trooper Dawson, how long
13 afterwards?

14 A It was about 19, 20 days.

1 15 Q I think according to Trooper Dawson it was about
16 19 or 20 days does that correspond with your thinking?

17 A Yes.

2 18 Q Did it surprise you that you were arrested?

19 A No, not really.

3 20 Q Did you know that you were going to be arrested?

21 A Basically, yeah, I figured they got what they
22 wanted now, you know, he told me before I left they'd be
23 getting hold of me.

24 Q When you were arrested, were you taken before the
25 district justice?

A-335

1 A Yes.

2 Q Bail set?

3 A Yes.

4 Q And you couldn't meet the bail so you went to
5 jail?

6 A Yes.

7 Q How long were you in jail about?

8 A A little over a month.

9 Q I'm sorry?

10 A Little over a month.

11 Q A little over a month. It was while you were in
12 jail that I became your lawyer?

13 A Yes.

14 Q Describe how you were, I can't, you can describe
15 how you were when I came in to see you tell the jury were you
16 suffering in any way?

17 A With my arm and my sugar not getting right care I
18 was pretty basically distraught, didn't have any sense of
19 even what was going on. I was just like it was like, like la
20 la land.

21 Q Do you remember a young man by the name of Setzer
22 who testified in this courtroom today who was in jail at the
23 same time?

24 A Yes.

25 Q He was in your cell block?

A - 336

1 A Yes.

2 Q Do you remember talking to him about what you were
3 charged with or what you may have done or anything about your
4 case?

5 A No, he asked. I told him I had four counts of
6 aggravated assault, that was it.

7 Q Did he say anything to you about testifying
8 against you?

9 A No, he didn't say anything to me but I got
10 transported from Potter County Jail over to Warren and when I
11 got back there was a new guy in our cell. We got along and my
12 preliminary came up and they, something was said out front
13 that I was telling about it. I don't know if it was really
14 said or not.

15 MR. LEBER: I'll object going into hearsay.

16 THE COURT: Sounds like we're headed for
17 hearsay here.

18 A Any way when I got back they moved my cell and
19 this new guy, I believe his name was Roger Dunn, told me
20 that.

21 MR. LEBER: Excuse me.

22 MR. FINK: You're not allowed to say what
23 anybody else told you so let's just forget that okay.

24 Q Do you have any children?

25 A Yes, I have one son.

A-337

Q Where is that child living?

A He's living with his mother.

Q Is that custody thing or has it been in litigation before a judge or anything?

A Yes.

Q What county?

A McKean.

Q What is the caption of the case? Who is the mother of the child?

A Jodi Lynn Murray.

Q Is there an order of court outstanding with reference to the custody of your son?

MR. LEBER: I'm going to object to that. I'm not sure what the relevance is.

MR. FINK: I haven't asked what's in it. I ask if there was, I intend to show this to Mr. Leber and to the Court.

THE COURT: As to this question, objection is overruled.

MR. FINK: Your Honor, after the last question on the record I showed the district attorney the two page custody Order dated October 5th, 1996 signed by the Honorable John M. Cleland, Presiding Judge of McKean County with particular notation to the first paragraph of the second page thereof which says, quote, "Father agrees that there

A-338

1 should be no contact between Lori Moore and their son." I
2 showed it to the Court. His Honor asked me what I felt the
3 relevance was, and I informed the Court that I felt that this
4 was in essence a court order suggesting that Lori Moore was
5 not fit to, was not a fit environment for the subject of the
6 custody, namely the son of the parties, Mark Christopher Dale
7 Bailey and Jodi Lynn Murray. His Honor suggested that this
8 was character assassination and irrelevant. It is my
9 position, Your Honor, on behalf of the defendant that it is
10 relevant and tends to show that Court felt that Jodi, I'm
11 sorry, that Lori Moore was not a good environment for this
12 child, that being so she may well have not been a good
13 environment for the the subject child sub of this proceeding
14 as oppose today my client.

15 MR. LEBER: Judge, our position it's
16 immaterial and irrelevant, it's hearsay. Further, I would
17 just point out that text of that order says that defendant
18 agrees that the son will not be with Lori Moore. We have no
19 idea what the basis of that is, and I think it's again
20 prejudicial to the Commonwealth. It opens Pandora's box of
21 issues and I think it's not admissible under any theory as
22 offered.

23 THE COURT: As offered I think it's
24 irrelevant, certainly well could be hearsay and definitely
25 most clearly it invites the jury to jump into wild

A-339

1 imagination. Is it because the parties don't get along,
2 somebody smokes, somebody drinks. We don't know, and I can't
3 tell the jury to engage in that speculation even if we get
4 through the other inadmissible problems so the offer is noted
5 on the record and I will decline to permit it.

6 MR. FINK:

1 7 Q Mark, since you were arrested for the charge or
8 series of charges which you now face here in this courtroom
9 have you seen Lori Moore?

10 A Yes.

2 11 Q Under what circumstances?

12 A When I got out of jail, I went to see her and it
13 was from then on that we were seeing each other. And then
14 she left me this past October. And then she got a hold of me
15 it was on a Wednesday night, and then there was a Sunday that
16 she called after work and she come and stayed in Duke Center
17 so I could take her to Bradford to get some papers from a
18 doctor--and then Tuesday I took her to the doctor and then it
19 was like she asked me if I was going to the next doctor's
20 appointment. She was suppose to call, I was suppose to pick
21 up a prescription for her. There was something else I was
22 suppose to do, she was suppose to call, and she hasn't called
23 since.

3 24 Q Have you ever intentionally harmed in any way
25 physically or otherwise any of her children?

A-340

1 A No, sir, I did not.

2 Q Have you ever placed any of her children in a
3 situation where for which you were responsible that it was
4 practically certain that that situation would cause harm or
5 injury to the child?

6 A Not that I'm aware of.

5 7 Q Do you recall the incident where that was
8 testified to whereby, I guess, Lori and her sister and you
9 were in the living room and Rebecca was in her crib and she
10 cried and you were the one that got up and purportedly closed
11 the door and then there was louder crying by Rebecca, do you
12 remember that incident at all?

13 A No, I don't.

14 MR. FINK: Cross-examine.

15 THE COURT: Commonwealth.

16

17 CROSS-EXAMINATION BY MR. LEBER:

6 18 Q Mr. Bailey, you apparently ceased living with Miss
19 Moore about the time that Rebecca was born; is that correct?

20 A Yes.

7 21 Q And then you moved back to live with her at her
22 sister's house in June; is that correct?

23 A Yes.

8 24 Q That's when you got the job at Emporium
25 Specialties?

A-341

1 A Yes.

2 Q And during that period of time Lori was not
3 employed; is that correct?

4 A No, she wasn't.

5 Q How was she supported during that period of time?

6 A She was on public assistance.

7 Q Receiving public assistance. Now, there was talk
8 about your medications. Your mother testified about that and
9 so forth. Were you at any time taking medication to control
10 your anger?

11 A Yes, I was. At the time it was called Tofrinal
12 T O F R I N A L.

13 Q And how long were you taking that?

14 A I was taking it regularly for a couple months
15 after I got out of the hospital. There was a couple times I
16 got upset and I just said I ain't going to bother taking it
17 any more.

18 Q Are you taking it now?

19 A No, I'm taking something Wellbutrin.

20 Q That's something to control your anger?

21 A For depression, and I don't know how he worded
22 it. It's for two different things.

23 Q Well, does that work to control your anger?

24 A It helps, yes.

25 Q And you're taking that now?

A-342

1 A Yes, I take it twice a day.

2 Q So you feel that is effectively controlling your
3 anger?

4 A It helps, yes.

5 Q And without taking medication of some kind do you
6 acknowledge that you do have a problem with anger?

7 A To an extent.

8 Q What extent is that?

9 A I mean, I get, everybody gets upset, but there's
10 times I feel I go over board.

11 Q So there are times whenever you feel that you get
12 more angry than the average person gets angry; is that
13 correct?

14 A There's times, yes.

15 MR. FINK: I guess I'll belatedly object,
16 more angry than ever, I don't know what that means.

17 MR. LEBER: I believe I said more angry than
18 the average person.

19 MR. FINK: I'm sorry.

20 THE COURT: Right.

21 Q And I asked your mother about incidents when you
22 smashed the windshields on vehicles. How many times has that
23 happened?

24 A A lot more than nine.

25 Q More than nine times?

A-343

1 A Yeah.

2 Q What would you smash the windshields with?

3 A My fist. There was one incident where I was told
4 that I wasn't, by my ex-girlfriend, I wasn't allowed to take
5 my truck out in the woods with a friend of mine. I grabbed
6 my T bar out of the back and smashed the window and said, now
7 the truck won't go anywhere.

8 Q You were angry at your girlfriend?

9 A She wasn't paying for the truck. She thought she
10 was going to tell me. You go buy a new sports car and your
11 wife telling you you ain't taking it downtown. It was my
12 truck I think I had a right to be upset. Yeah. I probably
13 took it over board but.

14 Q And you said more than nine times you've smashed
15 windshields?

16 A I figure in the last, I'd say within the last
17 five, six years I've replaced about nine windshields.

18 Q And this one, the one you've mentioned with your
19 girlfriend when she told you you couldn't take the truck you
20 did that with some kind of a bar, some kind of tool?

21 A It was a teeter pipe.

22 Q The rest of them you did with your fist?

23 A Yeah, a lot easier to break them with your fist on
24 the inside then on the outside.

25 Q When was the last time you broke a windshield with

A-344

1 your fist?

2 A I don't recall, it's been a while.

3 Q Now, you were with Lori Moore until October, two
4 months ago?

5 A Yes.

6 Q From the time you got out of jail?

7 A Yes.

8 Q And where have you and Lori lived?

9 A 1 Oakland Avenue, and then from there 714 Main
10 Street, Duke Center.

11 Q So Bradford first then Duke Center?

12 A Yes.

13 Q The new medicine that you described that you're
14 taking when did you start taking that?

15 A When I was in jail.

16 Q Okay. Now, do I understand Mr. Fink asked you
17 about whether you observed any injuries to Rebecca. Do I
18 understand you're testimony to be that the only time you
19 would see it would be when Lori would show you bruises; is
20 that correct?

21 A Yes, because I wasn't around Rebecca as much as
22 Lori. I worked all day and by the time, well, yeah, I work
23 all day, I'd come home, me and Lori would sometimes go out or
24 we'd take the kids. Bath times if there was something wrong
25 she would come and show me.

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5 1 Q And how many times did that happen that there was
2 something wrong?

3 A I don't remember.

6 4 Q Was it more than once?

5 A I don't think it was.

7 6 Q And you went on to say you never really saw
7 anything before September of 1996; is that correct?

8 A To the best that I can recollect, yes.

8 9 Q Now you gave testimony about the incident when you
10 were in bed, Lori was out with the children, Rebecca started
11 to cry, Lori came and woke you up and told you that Jennifer
12 had fallen on Rebecca; is that correct?

13 A No, Lori was in the bedroom with me when Jennifer
14 had fallen on Rebecca because she hollered out and asked Alan
15 why Rebecca was crying, then Alan told Lori that Jennifer had
16 fallen on her leg.

9 17 Q And that was in September of 1996?

18 A Yes, we were living in Roulette.

0 19 Q You were living in Roulette. And do you know when
20 that happened in relationship to when Rebecca was taken to
21 see Dr. Asar and taken to the hospital for x-rays and so
22 forth?

23 A It was that morning, the morning that she fell on
24 her is when Lori showed me the bruise I believe.

25 Q So when you first woke up that morning that's when

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1 it was that very day that you went to the hospital?

2 A I believe so, and it was--I usually sleep until
3 afternoon so I was it was mid day, and at that time I was
4 working three to eleven shift.

2 5 Q And so that day would have been Tuesday; is that
6 correct?

7 A I believe so, yes.

3 8 Q Let's talk about Mr. Setzer's statement, his
9 testimony he gave here. Basically you're saying Mr. Setzer's
10 statement wasn't true?

11 A Yes, I never discussed nothing with him. All I
12 told him was I had four counts of aggravated assault, that
13 was it, and then I went to Warren and I came back. He come
14 in back into the cell with an envelope of papers saying he
15 just got so many counts dropped against him and he snickered
16 about it.

4 17 Q Now, Mr. Setzer's testimony he did say among other
18 things that you wanted to find out how you could go to Warren
19 State Hospital; is that correct?

20 A No, it ain't, trust me, I ended up there. It's
21 not the place to be and I did not ask how to get out of jail.

5 22 Q Did you not believe that by claiming that you were
23 insane or had some kind of mental problem you would be able
24 to beat this charge that's against you?

25 A Can you say that again.

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6 1 Q Did you believe that if you could show that you
2 were insane or that there was some kind of other mental
3 problem that caused you to do what you did or what you were
4 charged with doing that you would be able to beat this charge
5 against you?

6 A No.

7 7 Q So you did go to Warren State Hospital?

8 A Yes.

8 9 Q And I guess everybody knows that's a mental
10 institution?

11 MR. FINK: Excuse me. May we approach?

12 (Following discussion held at the bench).

13 MR. FINK: It was me trying to get him into
14 Warren State Hospital. It was I that tried to get him into
15 Warren State Hospital. I was afraid that he would commit
16 suicide and I tried I called everybody, including you.

17 THE COURT: I believe that sounds familiar
18 actually.

19 MR. FINK: And I'm afraid I'll have to try to
20 take the stand. I know the ethical, I'm sorry, but unless we
21 can do something about it now I don't know what to do about
22 it.

23 THE COURT: It's a mess because he mentioned
24 it on his direct.

25 MR. LEBER: I can try to straighten it out on

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1 the record and ask him specifically.

2 MR. FINK: He may not know it, but I will
3 swear on the record that I called everybody.

4 THE COURT: In fact that sounds familiar.

5 MR. FINK: To try to get him in the hospital.

6 THE COURT: I believe I have firm
7 recollection that you did speak to me about it.

8 MR. LEBER: I don't have a problem with the
9 Judge, with the Court maybe right now giving a curative
10 instruction. I don't feel responsible for it.

11 MR. FINK: I'm not.

12 MR. LEBER: To avoid mistrial I don't want to
13 waste any more time.

14 MR. FINK: I don't know what to do.

15 THE COURT: Let's talk about what I should
16 tell the jury. Reference was made to the defendant being in
17 a mental hospital, counsel have agreed that one reason he
18 entered a mental hospital was suggestion of his counsel, who
19 had concerns of his well being.

20 MR. LEBER: I'd like the Court to know that I
21 just became aware of that, I was not aware of that.

22 MR. FINK: I don't doubt that a bit.

23 THE COURT: Ladies and gentlemen of the jury,
24 there was most recently a reference made in the direct
25 examination by Mr. Fink and now in the cross-examination by

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1 Mr. Leber relative to the defendant here, Mr. Bailey, being a
2 patient at Warren, which I guess is in fact known to most of
3 us as a mental health treatment facility. Counsel have agreed
4 to have me tell you that we all just learned--I shouldn't,
5 Mr. Fink has shared with us and refreshed my recollection
6 that one reason Mr. Bailey entered that facility was at the
7 request of his counsel who was concerned about his mental
8 health status. The Commonwealth did not know that prior to
9 the side bar. Mr. Fink reminded me that he had called me on
10 that very subject matter some months ago, and I believe that
11 is my recollection as well now that he jogged my memory. So
12 we wanted to set the record clear as to how that came about,
13 and again do not infer anything adverse to the Commonwealth
14 or the defense because I think we all just became aware of
15 that, again at the words of Mr. Fink. So thank you.

16 MR. LEBER:

9 17 Q As a result of your visit to Warren, was it at
18 that time you were placed on this new medication; is that
19 correct?

20 A Yes, when I first got there, they, what they did
21 like a past medical history, and the doctor that I was seeing
22 felt that with everything that he got off my old records that
23 this other drug would be more appropriate, and I've been on
24 it ever since.

25 Q So prior to going to Warren you were not taking

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1 anything relative to your depression or your anger problems?

2 A No, I wasn't.

1 3 Q And on the statement that you gave to Trooper
4 Dawson you indicated that you were in, you were being treated
5 at Bradford in May of 1995; is that correct?

6 A Yes, that was '95, and I believe the month was
7 May.

2 8 Q In May of '95, and that it was at that time that
9 you were prescribed the Tofrinal?

10 A Yes.

3 11 Q At that time when you gave the statement to
12 Trooper Dawson you said you took that for approximately five
13 months and then I just stopped taking it; is that true?

14 A I'm not really sure exactly how long I did take
15 it.

4 16 Q So if that was true May is the fifth month to the
17 tenth month, until October of 1995 you took that, is that
18 correct approximately?

19 A Somewhere around there, yeah.

5 20 Q And I think also Trooper Dawson also asked you
21 when did you stop taking it, how long ago, and you said
22 probably a year, a year and a half. So that would have been
23 a year, year and a half before February 28th of 1997; is that
24 correct?

25 A About that, yes.

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1 Q So during that period of time you weren't taking
2 any medication for that problem?

3 A No, the only medicine I was on was for my
4 Diabetes.

5 Q And included in that period of time when you
6 weren't taking any medication for that was the period of time
7 during which you were living with Lori and during which
8 Rebecca was living with you; isn't that correct?

9 A Yes.

10 Q So that condition existed as well as the Diabetes
11 during that period of time; is that correct?

12 A Yeah.

13 Q Those were the two medical problems in essence
14 that you were facing at that time; is that correct?

15 A That and my busted arm.

16 Q And your broken arm okay. With your Diabetes when
17 your blood sugar would get high you would get agitated; is
18 that correct?

19 A Yes.

20 Q Agitated does that mean irritable?

21 A Sometimes.

22 Q When you're agitated or irritable does that mean
23 you're short on patience?

24 A Sometimes not always.

25 Q And does that mean that things like children

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1 crying or children making demands upon you cause you to be
2 upset?

3 A No.

4 Q That never happened?

5 A I get, you know, a little bit upset when they'd
6 cry, nothing that was real drastic or anything.

7 Q Okay. Now, in July of '95, I guess, according to
8 your testimony and that of Brother Michael you and Lori were
9 together in Bradford; is that correct?

10 A Yeah, I believe it was July.

11 Q When was it that you were admitted to the Bradford
12 Hospital?

13 A May of '95.

14 Q Alright. You did testify to that I'm sorry. Now,
15 you indicated that here that in your testimony you admitted
16 there was a problem with taking Rebecca out of the car at one
17 time where she may have gotten her foot caught?

18 MR. FINK: I'll object to that. He did not
19 say it was a problem. What he said was how he did it,
20 Commonwealth is characterizing it as a problem.

21 THE COURT: We'll let counsel rephrase.

22 MR. LEBER: I'll rephrase.

23 Q You did testify that something happened relative
24 to Rebecca at some point when you took her out of the car,
25 out of the car seat; is that correct?

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1 A Yeah, it was a time when her foot got caught on
2 the seat belt.

9 3 Q Her foot got caught in the seat belt. Now Alan
4 came in, little boy, Alan Moore came in and testified that he
5 saw you pull her out of a child restraint seat when you were
6 in Roulette and that it caused Rebecca to be very upset, cry
7 and scream, so forth?

8 A I don't ever recall that happening.

0 9 Q That never happened. In your statement that you
10 made to Trooper Dawson that was recorded here the quote, I
11 believe using your language was that on, Page 4 you said, "I
12 dragged her out of the car, I was upset, bad day." Did Alan
13 witness that?

14 A No, I never dragged her out of the car.

1 15 Q Was that a word that Trooper Dawson put into your
16 mouth, dragged?

17 A I may have said that but I have never done it is
18 what I'm telling you. I never dragged a kid anywhere. I
19 mean when I pick them up I pick them up with respect. I never
20 drug a kid out of any car.

2 21 Q But that is the word that you used?

22 A Yes, it's the word I used but I never done it.

3 23 Q Now, I believe it was Trooper Davis that testified
24 that you acknowledged that you had a great deal of anger, you
25 stated that you do have one child, that's a son; is that

A-354

1 correct?

2 A Yes.

4 3 Q And he lives with his mother; is that correct?

4 A Yes.

5 5 Q And was there a time when you weren't able to see
6 that child?

7 A The whole time I was with Lori.

8 MR. FINK: Your Honor, counsel is opening up
9 an area which has been precluded to me, and I would
10 respectfully suggest that unless counsel finds another line
11 of questioning that I ought to be allowed to explore what
12 he's opened up.

13 MR. LEBER: Not related at all, Your Honor.

14 THE COURT: We're not going to speculate at
15 either table. You know my guidelines let's go with that.

6 16 Q I guess the last question was was there a time
17 when you couldn't see that son?

18 A Yes, there was.

7 19 Q And Trooper Davis had stated that made you angry.
20 Did that make you angry?

21 A I was angry at the child's mother, yeah, it's my
22 son no matter who I'm with, doesn't mean I should not be
23 allowed seeing him.

8 24 Q He also said that you told him that Rebecca
25 reminded you of your son and the fact that you were not able

A-355

1 to see your son; is that true?

2 A Yes, yeah, she reminded me of my son. I loved her
3 as if she was my son.

4 Q Now, again this incident where you indicated that
5 Jennifer fell on Rebecca's leg that happened in Roulette?

6 A Yes.

7 Q And that happened on September 24th?

8 A I believe that's the day it happened. I was
9 sleeping when it happened.

10 Q Now, when you gave your statement to Trooper
11 Dawson regarding the first incident, the one that you said
12 was accidental did you or did you not tell Trooper Dawson at
13 that time that occurred on September 23rd?

14 A It was right in that time frame I don't remember
15 exact date.

16 Q But did you tell Trooper Dawson--did you hear the
17 tape?

18 A No, I didn't hear the tape. I was sitting over
19 there I could not hear it.

20 Q So on September 23rd if that is in fact your
21 statement on the tape this incident occurred when Rebecca
22 fell and you caught her by the leg, and then the next day is
23 the day that Jennifer falls on Rebecca and you go to the
24 hospital; is that correct?

25 A I believe so, yes.

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4 1 Q Mr. Fink also asked you about your statement that
2 regarding the car seat whether you meant it or not. You said
3 I dragged her out of the car, I just grabbed and pulled the
4 car seat out so I could get her out of the car and into the
5 house, and that was apparently the result of another injury,
6 and Trooper Dawson asked you had something taken place, and
7 Mr. Fink read that you said Jennifer got sick and was
8 fussing.

5 9 Q Did Jennifer throw up?

10 A She made a pretty good mess in the back seat and I
11 wanted to get Rebecca out of it.

6 12 Q That caused you to be upset?

13 A I was upset, but not to a real frantic extent.

14 Q Your statement was, Jennifer had got sick and was
15 fussing and that did not help me out any with being of sound
16 mind; is that what you said?

17 A I don't recall if that's what I said or not.

8 18 Q So what you're saying is the part about Jennifer
19 getting sick and fussing that part is true, but the part
20 about dragging Rebecca out of the car is not true?

21 A I didn't drag her. I picked the car seat up. I
22 put the front seat forward and I pulled her out so I could
23 get her out of the car. You got to pull you can't just pick
24 up and expect her to get her out from the back seat of a car.

9 25 Q And the incident I guess we're talking about the

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1 second or actually third bone break you testified, "I went to
2 pick her up out of the crib, her leg was between the bars, I
3 picked her up, when I picked her up, her leg got caught, and
4 it vibrated the whole crib".

5 MR. FINK: Is there a question?

6 MR. LEBER: There's about to be if I have a
7 chance.

8 Q The term, "it vibrated the whole crib," are those
9 words that Trooper Dawson put into your mouth or is that what
10 happened?

11 A It made a noise on the crib and with it being an
12 old crib it shook. As a matter of fact that very crib
13 Jennifer had and the crib fell apart when Jennifer was in it
14 down at Jeff and Ray's.

15 Q So in all of these statements, talking about
16 picking her up too hard and everything else like this you're
17 admitting to breaking many bones in an infant's body?

18 A I didn't admit to nothing.

19 MR. FINK: Objection.

20 THE COURT: I don't believe the question is
21 complete.

22 MR. LEBER: It was not, Your Honor.

23 THE COURT: Let's hear the question.

24 Q You're admitting to breaking many bones on an
25 infant's body because you thought if you didn't do so that

A-358

1 you would never get out of the police barracks; is that
2 correct?

3 A Yes, he told me, he come out, he told me his boss
4 wanted to speak to me, it would only take a couple minutes.
5 I was in there for over two, three hours.

6 Q But that's because you agreed to take polygraph
7 test?

8 A It was police entrapment is what it was.

9 Q I see. You did agree during that period of time to
10 take polygraph test?

11 A He come out to the car and I told him, no, I
12 wasn't going to take it. He came in and came out and said my
13 boss wanted to talk to me.

14 Q And you admitted all these things?

15 MR. FINK: Objection admission it's up to the
16 jury to determine if it's admission or not.

17 THE COURT: I'm trusting the term is being
18 used colloquial sense not legal.

19 MR. LEBER: I'm using that rather than
20 confessing.

21 Q You admitted to all these things you believed you
22 wouldn't get out of the State Police barracks?

23 A Yes, I was scared.

24 Q What made you believe if you did admit to breaking
25 at least four bones of an infant you would get out of the

A-359

1 State Police barracks if you didn't?

2 MR. FINK: Could I object again. He has not
3 admitted to breaking four bones of an infant, he has not.

4 THE COURT: I will ask counsel to
5 re-characterize the question.

6 MR. FINK: Thank you, Your Honor.

8 7 Q What made you believe, Mr. Bailey, that if you
8 admitted to possibly breaking four bones on an infant and
9 told the officer how these might have happened, what made you
10 believe that you would get out of the State Police Barracks
11 if you did something like that?

12 A Because him and his Sergeant both told me if I
13 admitted it I'd only get a fine.

14 Q Now Mr. Bailey, do you believe in Potter County
15 that we give fines, do you really believe we give fines for
16 people who break the bones of anyone let alone an infant.
17 Did you believe that at that time?

18 A It was coming from a law officer. If you can't
19 believe them, who can you believe.

0 20 Q So you did believe that?

21 A Yes, I did.

1 22 Q And so because of that you made these statements?

23 A Yes.

2 24 Q Now, during the period of time after you got out
25 of jail you continued to live with Lori were you supervised

A-360

1 was Lori and her children supervised by Children Youth
2 Services?

3 A Yes, they were.

4 Q And Beth Sigafos back here was case worker that
5 was involved; is that correct?

6 A Yes.

7 Q And since you've been out of jail you
8 feel that your relationship with Lori's children has been
9 okay, you've had no problems?

10 A The one time I was with them we didn't have no
11 problems and that was in August of '97.

12 Q The one time you were with them?

13 A Yes.

14 Q I thought you continued to live with Lori up until
15 October of 1997?

16 A It was after, yeah, I did live with Lori, but I
17 wasn't allowed around the kids, the children were at Tammy's.

18 Q Alan and Jennifer were at Tammy's?

19 A Yes.

20 Q Since September of 1996 have you had occasion to
21 visit with Rebecca at any time?

22 A I believe I have, I can't remember the dates.

23 Q Do you remember how it was that Rebecca responded
24 to you?

25 A She was cranky.

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1 Q Did she act like she was afraid of you?

2 A She acted like that around me. She acted like
3 that around her Uncle Mike. Only ones she would really go to
4 is Tammy and Lori.

5 Q Does that mean she would act afraid around you?

6 A She acted upset, yes.

7 THE COURT: Ladies and gentlemen, I don't
8 mean to cut counsel off I think we cut off the Commonwealth
9 this morning so we will cut off the defense this afternoon.
10 We'll take afternoon recess now for approximately ten
11 minutes. Again do not discuss the case among yourselves or
12 with anyone else, thank you. Court will stand in recess ten
13 minutes.

14 (Ten-minute recess).

15 THE COURT: Ladies and gentlemen, I've
16 conferred with counsel. It is our present intention to try to
17 get this trial done today. We only planned on having you
18 here for two days. We'll do our best to keep the case moving
19 and place it in your hands as soon as we can. There are of
20 course various steps that we have to go through to make sure
21 that every one has a chance to address the jury and present
22 their case fully. I do appreciate your cooperation and will
23 keep you advised on how our time tables are going. Very well,
24 I believe Mr. Bailey was still on the stand. There was some
25 cross-examination going on by the Commonwealth, witness

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1 remains under oath.

2 MR. LEBER:

2 3 Q Mr. Bailey, you mentioned that Trooper Dawson
4 wanted you to go in and talk to his boss, was that boss
5 Sergeant Shirley of the State Police?

6 A Yes.

3 7 Q Did you understand he was the officer in charge of
8 the State Police Barracks?

9 A Yes.

4 10 Q He's the one that said to you that he would talk
11 to the D A and D A would only give you a fine; is that
12 correct?

13 A That's what was said to me.

5 14 Q You indicated that you felt that you wouldn't get
15 out the door if you didn't confess. Did anybody place you in
16 handcuffs?

17 A No, at the time they couldn't put me in hand cuffs
18 my arm was in a sling and up by my side.

6 19 Q How about shackles on your feet?

20 A No.

7 21 Q Ever lock you in a room?

22 A Not that I can recall.

8 23 Q Did they ever threaten you in any manner?

24 A Not that I can recall.

9 25 Q Trooper Dawson and Trooper Davis have both

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1 testified that they advised you of your rights, right to have
2 an attorney, right to remain silent, right to have an
3 attorney appointed for you if you couldn't afford one. Did
4 they do all those things? Did they advise you of all those
5 rights?

6 A I believe so, yes.

0 7 Q Did anybody at any time prevent you from leaving
8 there?

9 A I was in the back room. I wasn't sure exactly if I
10 could get back out that door that was locked or not I mean.

1 11 Q Wasn't the issue--

12 A I was scared.

2 13 Q The issue that we're talking about with Sargent
14 Shirley was whether or not you were going to take the
15 polygraph test; isn't that correct?

16 A Ask that again, please.

3 17 Q The issue you were talking to Sargent Shirley
18 about was whether or not you were going to take the polygraph
19 test; is that correct?

20 A I believe so, yes.

4 21 Q And that was it, nobody said anything else other
22 than what you said that you would only be given a fine if you
23 admitted your involvement in this thing?

24 A Correct.

5 25 Q And because of that you believed that you had to

A-364

1 make this statement that you made in order to get out of the
2 state police barracks?

3 A Yes, I was scared.

4 MR. LEBER: I have nothing else.

5 THE COURT: Any redirect?

6 MR. FINK: Very brief, Your Honor.
7

8 REDIRECT EXAMINATION BY MR. FINK:

6 9 Q You were questioned by the District Attorney on
10 cross-examination concerning custody of your child. Did you
11 ultimately get ample visitation of your child?

12 A I got to see him one day and that was on his
13 birthday, his first birthday.

14 Q Did the Judge in McKean County expand your
15 visitations in October 8th of 1996?

16 A That's when they were drawn up, yes.

8 17 Q And you and the mother were given joint legal
18 custody; is that true?

19 A I believe so.

9 20 Q On this order.

21 MR. FINK: I have nothing further, Your
22 Honor, thank you.

23 THE COURT: Anything further from the
24 Commonwealth?
25

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1 RECROSS EXAMINATION BY MR. LEBER:

2 Q You said you saw your son on his birthday?

3 A It wasn't on his birthday, it was, I believe it
4 was day before because we worked out a thing. It was his
5 birthday they were having a big party for him so they figured
6 I could have him the day before that way we could have a
7 party at my mom's for him and that way it wouldn't, the two
8 parties wouldn't clash, one go over and interrupt with the
9 other one.

1 10 Q When was that?

11 A That was October, it was October of '96. It would
12 have to be because he's two so October of '96.

2 13 Q Have you seen the child since then?

14 A I saw him just last week for about five minutes.

3 15 Q That's the first time since October of '96?

16 A That's the first time since then. I was actually
17 well, no, I got to take that back. I did see him when I got
18 out of jail. I saw him for, I think I saw him a couple times
19 a week for about the first two weeks I was out of jail. I
20 saw him on a few different occasions when his mother's
21 boyfriend wasn't around because he didn't like the idea of me
22 going down there seeing my son because he wanted to adopt him
23 and I told him, no way.

4 24 Q So you saw your child in October of '96?

25 MR. FINK: This has been asked and answered I

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1 object.

2 THE COURT: I gather we're getting repetitive
3 here.

4 MR. LEBER:

5 Q So other than three times that you've testified
6 you've not seen your child?

7 A I saw him, I believe, it was last week for about
8 five minutes. I was hanging pizza flyers with my boss and we
9 went down the street that they live on and I told him to
10 prevent any problems, I said you take the side that Jodi
11 lives on I'll take the other side. I was on the other side
12 of the street she happened to come to the door, she saw me
13 walking down the street, and we went all the way down, come
14 back up. Me and Kevin where we are going to go next. She
15 ran from the door, I looked at Kevin, what's that all about.
16 And it was right shortly after she left the door she come
17 back and had my son in her hands and told him there's your
18 dad, do you want to see him, and I went over to see him.

6 19 Q Is that all the visitation that you're allowed?

20 MR. FINK: Your Honor, I'm going to object on
21 the basis it's been asked and answered three times.

22 THE COURT: Let's hear the question.

7 23 Q The question, is that all the visitation you are
24 permitted by the Court in McKean County?

25 MR. FINK: And I object to it.

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1 A No, I'm suppose to have him every other week, it's
2 in the paper. I believe it's first third and fourth weekend
3 of every month, every other holiday and like Father's Day and
4 stuff like that I'm suppose to see him. That Court Order has
5 been broke since it was wrote up.

8 6 Q And the parties of that Court Order are you and
7 this Jodi?

8 A Correct.

9 MR. LEBER: Nothing else.

10 MR. FINK: May I, Your Honor.

11 THE COURT: You may.

12 MR. FINK:

9 13 Q I'm going to show you a Court Order of October
14 8th, 1996 which has already been shown to the District
15 Attorney and ask you to read the last paragraph of that as to
16 refresh your recollection. Don't read it out loud, read it
17 to, use it to refresh your recollection as to the custody
18 granted by the Court, the expanded custody granted by Judge
19 Cleland as of October 8th, 1996.

0 20 Q Now what expanded visitations did you get under
21 the Court Order of October 8th, 1996 to your son?

22 A The only visitation I got was--

1 23 Q On that order the expanded?

24 A I didn't get none of the expanded. I didn't get
25 none of the overnight visitations.

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2 1 Q What does the Order say in that respect?

2 MR. LEBER: Excuse me, Your Honor.

3 MR. FINK: Okay, I agree. Your Honor, I'm
4 going to have this marked as Defendant's Exhibit.

3 5 Q I show you what has been marked for purposes of
6 identification as Defendant's Exhibit Number 1 and ask you
7 what that is?

8 A It's a custody order for my son, Mark.

4 9 Q Where did you get this particular--it's a copy of
10 an Order; is it not?

11 A I believe so. It's one that was sent to me from
12 the Prothonotary in McKean County.

13 MR. FINK: Your Honor, I'm going to ask the
14 Court to take judicial notice of the Court Order of a sister
15 court in McKean County dated October 8th, 1996 as it relates
16 to the defendant's visitation of his son as given by the
17 Court.

18 THE COURT: Any objection?

19 MR. LEBER: Limited to that purpose I don't
20 have a problem.

21 MR. FINK: The last paragraph of the first
22 page may I have you read it.

23 THE COURT: I will take judicial notice as
24 requested.

25 MR. FINK: I now seek permission of the Court

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1 to read the last paragraph of the exhibit to the jury.

2 THE COURT: Granted.

3 MR. LEBER: No objection.

4 MR. FINK: "Beginning the first weekend in
5 April of 1997 father's custody should expand to the following
6 schedule. Overnight partial custody every other weekend from
7 11 a.m. Saturday until 11 a.m. Monday. Weekend custody should
8 change to every Wednesday, partial custody from 9:00 a.m. to
9 12 p.m. Parents may adjust times and dates of custody by
10 mutual agreement.

11 MR. FINK: I have nothing further, Your
12 Honor. Thank you.

13 THE COURT: Thank you, Mr. Bailey, you may
14 step down.

15 MR. FINK: Your Honor if I may have a moment
16 I'm anticipating resting.

17 THE COURT: Take a moment.

18 MR. FINK: Your Honor, I'm glad to report
19 that defense rests.

20 THE COURT: Very well. Is there any further
21 testimony in this matter?

22 MR. LEBER: One very brief rebuttal witness
23 Amy Tuttle.

24
25 A M Y T U T T L E, having been duly sworn, was examined and

A-370

1 testified as follows:

2

3

DIRECT EXAMINATION BY MR. LEBER:

5

4

Q Your name and address, please?

5

A Amy Tuttle, Coudersport Pennsylvania.

6

6

Q What is your occupation?

7

A I'm director of Social Services at Charles Cole

8

Hospital.

7

9

Q And how long have you been so employed?

10

A I've been in the department for nine and a half

11

years.

8

12

Q Were you employed there on September 24th, 1996?

13

A Yes.

14

Q And at that time did you have occasion to meet

15

with Lori Moore and Mark Bailey?

16

A Yes.

0

17

Q And what was the the occasion that you happened to

18

meet with them?

19

A I was called by staff in the emergency department

20

to come down, that we had a suspected child abuse case. It's

21

routine that I get involved with some of these cases as

22

liaison between patients and their families and doctor and

23

Children Youth Services if they're needed.

1

24

Q Mark Bailey you indicated was there. What was

25

your belief as to his relationship to the child at that time?

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1 A Initially I thought he was the father, but as the
2 visit went on I realized that he was a paramour.

3 Q And the particular injury that we were concerned
4 with or you were concerned with at that point was what injury
5 to the child?

6 A Initially it was the right ankle, but when x-rays
7 were taken other fractures showed up.

8 Q And the child was who?

9 A Rebecca Moore.

10 Q And in your presence or by you directly were the
11 parents asked when this injury occurred to Rebecca Moore?

12 A Yes, I did ask that question.

13 Q Who actually asked that?

14 A I believe Joy Glassmire asked the question from
15 Children Youth Services and I was present.

16 Q And which of the parties responded to that
17 question?

18 A I believe the mother did.

19 Q Where was Mr. Bailey when the mother responded to
20 that?

21 A In the room with us.

22 Q Within how great a distance?

23 A Couple feet, two feet, three feet.

24 Q And what did Lori Moore tell you at that point?

25 A She said that she first noticed swelling on the

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1 previous Thursday.

2 Q And what date would that have been?

3 A The 19th.

4 Q Did Mr. Bailey respond to that at all?

5 A He confirmed that also, he agreed with her.

6 Q And how was it that he expressed his agreement
7 with that?

8 A Just by saying that, yes, that's what he
9 remembered, that's what his recollection of it was also.

10 MR. LEBER: Thank you, nothing else.

11 THE COURT: Cross.

12

13 CROSS EXAMINATION BY MR. FINK:

14 Q Good afternoon to you. You were called by whom to
15 come down where, for what purpose?

16 A I was called by staff in the emergency room
17 department to come down there because they had been notified
18 that Dr. Supinski was to see a patient, a baby in the
19 emergency room department that was suspected child abuse.

20 Q Okay. What is your capacity?

21 A Director of Social Services.

22 Q Directress of social services?

23 A Hm-hmm.

24 Q I smile because you smile when I used the word
25 Directrix?

A-373

1 A I didn't expect that, but that's fine.

2 Q You recall of the question being asked when did
3 the event occur which gave rise to the condition which was
4 being treated. Is that what was asked? Who asked what?

5 A I believe Mrs. Glassmire asked when they noticed,
6 when the parents noticed that something was wrong with the
7 infant's foot or leg, and the response was that, it was, the
8 swelling was noticed the previous Thursday.

8 9 Q And you specifically remember my client saying,
10 confirming that by saying, yeah, that was the date is that
11 what he said?

12 A He agreed with what she said. He said, yeah,
13 that's about right.

14 Q Amy, I ask you to try to remember what it was that
15 he said. Do you remember exactly what he said?

16 A Probably not verbatim, but I remember that he
17 concurred with her.

0 18 Q By shaking his head?

19 A No.

1 20 Q By saying, you're right? What did he say?

21 A He said something like, yeah, it was about that
22 time, it was around that time.

2 23 Q About that time?

24 A Around that time.

25 MR. FINK: Thank you very much.

A-374

1 A Thursday.

2 MR. FINK: Thank you.

3 THE COURT: Anything further?

4 MR. LEBER: Nothing else. We have no other
5 rebuttal testimony.

6 MR. FINK: I guess I'm ready, Judge.

7 THE COURT: Ladies and gentlemen, the
8 testimony is now closed. You've heard Commonwealth
9 case-in-chief, Defense case and some rebuttal. Still three
10 things very important that need to happen next. I typically
11 give counsel another little break. They've been kind enough
12 and agreed to proceed without that before they make their
13 closing arguments. So you will next hear from Attorney Fink
14 on behalf of the Defendant, Mr. Mark Bailey. You'll next
15 hear from District Attorney, Jeff Leber, behalf of the
16 Commonwealth in terms of closing arguments, and finally you
17 will hear from me on behalf of the court system and the law
18 you are required to apply in a case such as this. Before we
19 begin, gentlemen, we did have a question on the verdict slip
20 if you'll recall. I don't know if anyone has suggestions as
21 to how that information can be delineated. I will be working
22 on that little bit here during our closings but.

23 MR. FINK: I just ask that it it will be
24 delineated with the Courts, under the Court's direction but
25 how.

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1 THE COURT: I'll work on that little bit
2 here.

3 MR. FINK: We'll be happy to abide the
4 Court's determination on that.

5 MR. LEBER: Judge, I think if I may, that
6 charges can be delineated consistent with our bill of
7 particulars, which we've charged specifically.

8 THE COURT: Thank you.

9 THE COURT: Ladies and gentlemen we'll go
10 into closing argument, Mr. Fink.

11 (Closing argument given by Mr. Fink).
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1 THE COURT: Very well, thank you, Mr. Fink.
2 At this time District Attorney Leber may close for the
3 Commonwealth.

4 MR. LEBER: Thank you, Your Honor. May it
5 please the Court, Mr. Fink. I appreciate Mr. Fink's offer of
6 jack in a box. My children are beyond that, I'm beyond that
7 so I'll respectfully decline that offer. I would point out
8 while that's a very generous offer that he made, I appreciate
9 that friendly gesture I have to take great exception in this
10 serious matter with what Mr. Fink has said in his closing
11 statements. I disagree with him on the law as he stated it to
12 you. I disagree with him as to the facts as he stated them to
13 you. On the law best I can tell you I believe you'll have to
14 listen very carefully to Judge Leete as he discusses these
15 various issues, particularly this issue of corpus delecti.
16 Don't believe it's anywhere near what Mr. Fink has made it
17 out to be. It's a relatively simple concept, and I believe
18 that there was abundance of testimony from all those doctors
19 that were involved before any confession was admitted into
20 evidence, any admission that was made that became a part of
21 the record that there was an instance of child abuse. We do
22 not have to prove beyond a reasonable doubt before that's
23 admitted that this man committed these various crimes all we
24 have to do is proof that somebody has committed a crime.

25 I would also point out to you that while Mr. Fink is

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1 correct that this is not a case about child abuse in terms
2 that a specific charge of child abuse is rendered here, there
3 is no such thing as a crime of child abuse under Pennsylvania
4 statutes. What we talk about with child abuse, of course, is
5 the aggregate types of crimes, that could be anything from
6 murder down to harassment that could be child abuse. Anything
7 that is done against the welfare, the health and well being
8 of the child we've talked about that generically as being
9 child abuse. Closest thing we have to that is what Mr. Bailey
10 is here charged with, four counts of it, which is endangering
11 the welfare of children. That in essence is closest thing we
12 have to a statute that deals specifically with child abuse.
13 But the other charges aggravated assault, which he's charged
14 with and simple assault which he's charged with are the same
15 for a child as they are for anyone of you, anyone who is an
16 adult. Somebody comes up and smacks you in the leg, breaks
17 your shin bone that's aggravated assault if it's considered
18 to be a serious bodily injury or simple assault if it's
19 considered not to be serious bodily injury. That's
20 indication for you as victim of that. That's the case if a
21 7-month old child is a victim of that.

22 I agree--I disagree. I keep saying I agree that's not
23 a Freudian slip because I do disagree when Mr. Fink says Mr.
24 Bailey over here is a very good young man. I suggest to you
25 and submit very strongly that the whole evidence in this case

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1 suggests that Mr. Bailey is not a very good young man.
2 Whether you decide that he's guilty of these crimes or not I
3 think everybody has to agree this is not a very good young
4 man. This is either a young man who is very malicious and
5 cruel or it's a young man who is very sick. This is a young
6 man who has acknowledged to you at least on nine occasions
7 because of his anger he smashes windshields out of vehicles.
8 This is a young man who on eight of those occasions
9 apparently has used his fists to do that. I've asked you
10 whether or not you know of anybody you would consider to be a
11 good young man who is so out of control, so little ability to
12 control his temper that you would consider that person to be
13 a very good young man. This also is a young man who in spite
14 of the fact Mr. Fink has read to you, has a court order that
15 allowed him to see his child every how many often times it
16 is, I think it was every other weekend, holidays, so forth.
17 Your recollection of that will have to control that. In
18 spite of that he hasn't barely seen his own child. He's had
19 this difficulty all along, and he's trying to convince, come
20 here into court and convince you folks that he cares about
21 and loves Lori Moore's children. I suggest to you that that
22 testimony just does not ring true. I suggest to you that this
23 is a young man that's in trouble, has been in trouble for
24 years. I'm not saying in trouble with the law I'm saying in
25 trouble with himself. This is a young man who is out of

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1 control, and the evidence shows in this case that he has hurt
2 Rebecca Moore. We are here to determine not whether he's a
3 good young man or bad young man but whether or not he
4 committed the particular crimes with which he's charged, and
5 I suggest to you that character of this young man has been
6 shown to you in this case and circumstantial evidence that
7 this is a man who abuses children and this is a man who did
8 in fact in this case abuse Rebecca Moore.

9 Just to make this very clear Mr. Fink said there were
10 five counts of each, there are four counts of each, four
11 counts of aggravated assault, four counts of simple assault
12 and there are four counts of endangering the welfare of
13 children. That is the official information that is filed by
14 the District Attorney in this particular case. Each one of
15 those counts and each category aggravated assault, simple
16 assault, endangering welfare of children pertain to four
17 distinct issues. The question is, and we're not asking you to
18 determine 12 different, whether 12 different instances
19 occurred we're asking you to determine whether or not four
20 different incidents occurred and first incident is the
21 incident that was reported on September 24th, 1997, that is
22 the incident where Rebecca Moore was taken to the hospital
23 and she has two broken bones in her right ankle, broken tibia
24 and fibula, that is the first incident, and we claim and
25 Commonwealth submits that the evidence has shown that he is

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1 guilty of aggravated assault relative to that incident, he's
2 guilty of simple assault relative to that incident and guilty
3 of endangering welfare of children relative to that incident.
4 The next two issues are the broken bones, broken tibia on
5 left leg and broken tibia on the right leg. We submit the
6 same thing he's guilty of each crime relative to each of
7 those broken bones, and we submit that fourth incident where
8 there were two broken ribs whether those happened same time
9 or different time we have charged one count of aggravated
10 assault, one count of simple assault and one count of
11 endangering welfare of children relative to those broken
12 ribs.

13 I think that throughout your determination of this
14 matter I want to emphasize to you one important point and
15 that is that as the Judge has already charged you and will
16 charge you again in dealing with the concepts of reasonable
17 doubt and dealing with this corpus delecti matter and dealing
18 with the issue of whether or not there is sufficient
19 circumstantial evidence you have to use your common sense in
20 determining those issues. And let me give you an example
21 relative to circumstantial evidence. As I told you before
22 there is no direct evidence in this case, however, that's
23 what I told you whenever I made my opening there is one piece
24 of direct evidence in this case, and that is the eye witness
25 who is Alan Moore who saw the one incident where he described

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1 the defendant ripping the child out of the car seat, that's
2 an example of direct evidence. That is what you see there.
3 The circumstantial evidence, however, as I told you at the
4 beginning and I think Judge Leete will charge you,
5 circumstantial evidence is all the circumstances all the
6 surrounding events and that circumstantial evidence alone if
7 you find it credible is sufficient to find a person guilty
8 beyond a reasonable doubt. That's basically what we have in
9 this particular case. Let me give you an example of this you
10 have to use your common sense. I live out in the country.
11 There's a lot of farms around there and a lot of people have
12 horses out there. If I'm sitting on my porch and I hear clip
13 clop, clip clop coming down the road and I hear something
14 whinny making a sound like a horse makes my conclusion would
15 be that it's a horse. Some people might say it could be a
16 camel, camels go clip clop, clip clop too. Some people say
17 it might be zebra. I don't know zebras whinny like a horse
18 assuming it does it might be a zebra. Well, it might be but
19 the over overwhelming evidence because of all the
20 circumstances I live here in the country with alot of
21 horses. There are no zebras that have been seen in these
22 parts in a long time and no camels been seen in these parts.
23 I'm going to bet and bet beyond a reasonable doubt that's
24 what is coming down the road, not a zebra, not a camel it's a
25 horse and that's what circumstantial evidence is all about

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1 and I submit to you that circumstances in this case prove to
2 you beyond a reasonable doubt beyond, any doubt that the
3 perpetrator of all of these offenses, the perpetrator that
4 caused four, six breaks of the bones of Rebecca Moore is that
5 person right over here, Mark Bailey. There's no other
6 suggestion that is plausible. All the evidence points to Mark
7 Bailey.

8 One of the items of the law that the Judge is going to
9 tell you about, and this relates to the charge of both
10 aggravated assault and simple assault is the element of
11 recklessness, that a person commits the crime by acting
12 recklessly. Well, let's deal, I want to deal just with that
13 alone just for a second here. Recklessness requires that a
14 person disregards a substantial risk that an injury such as
15 this would occur and he disregards that substantial risk and
16 the result is that an injury does occur. Let's talk about
17 whether or not there was a substantial risk in this case that
18 this child, Rebecca Moore, would be seriously injured, her
19 bones broken, and I suggest to you that the evidence shows
20 that Mr. Bailey over here did ignore a substantial risk.

21 Do you recall the testimony about the medication? Here
22 by Mr. Bailey's own words he talked about saying that
23 medication was something that helped him deal with his anger.
24 In 1995 he went to the Bradford Hospital, he was prescribed
25 medication in May of 1995 by October of 1995 when he was

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1 starting his relationship with Lori Moore he wasn't taking
2 that any longer he didn't take it any longer until March of
3 1997 whenever he was in jail over here and again went for
4 evaluation. This man knew and while he should know because he
5 was a man that smashed windshields constantly, he knew that
6 he had a problem with his temper he could not hold his
7 temper. This is apparent through this entire record. This is
8 a man who voluntarily decides I'm not going to take my
9 medication any more, and this is a man who since March of
10 1997 now he can hold his temper he can hold his temper here
11 in court because now he's taking his medication again. What
12 about the recklessness in terms of having a child with four,
13 five, six how many ever it is broken bones and not providing
14 any medical attention until the date whenever this one leg
15 became so swollen they had to go to Dr. Asar and subsequently
16 to the hospital. I suggest to you the amount of recklessness
17 that is engaged in by Mr. Bailey and not to mention his
18 girlfriend, Lori Moore, I'll talk more about that, I think
19 clearly establishes the recklessness to show that this man is
20 guilty of the charges of which he faces a requisite of the
21 recklessness.

22 You are the triers of the credibility. You have to
23 examine whether or not who is telling the truth when they
24 come up here on the witness stand. That's your job, that's
25 your duty. Problem in this case is we're kind of short on

A-384

1 witnesses, like I said, that give us direct testimony. Alan
2 Moore is the only one to give us any direct testimony about
3 what happened. You see a great deal more in the eyes of
4 people. Like in Alan's eyes Mr. Fink asked him whether Mark
5 Bailey was his buddy. You know. I don't think if you looked
6 at Alan, you looked at the way he responded I don't think
7 that Alan thinks that he's Mr. Bailey's buddy. Talk about in
8 Mr. Bailey's own testimony how the children reacted to him,
9 that they were scared of him, they were upset that he did not
10 have a good rapport particularly with Rebecca at the end.
11 Same testimony from Tammy Baker, the sister and from Lori
12 Moore Jennifer was afraid for a long period of time. You know
13 coincidentally even though nothing was discovered relative to
14 these problems remember the testimony that Jennifer did not
15 have any problem with her swollen ears and swollen feet until
16 after Mr. Bailey came to live and maybe it's just a
17 coincidence and then maybe not.

18 Mr. Bailey's defense seems to be that everybody else is
19 at fault. Now, as I told you I would mention Lori again I
20 have to tell you that Commonwealth, nobody believes that Lori
21 Moore is the Good Housekeeping mother of the year. This is a
22 woman who has acted irresponsible, who has acted really
23 admonishable relative to the care and relative to the welfare
24 of her children. We're not here to try Lori Moore we're here
25 with the trial of Mark Bailey. Everybody else is at fault for

A-385

1 this problem that Mr. Bailey is in. State Police Trooper
2 Bill Dawson is here. He and Sergeant Shirley conspired
3 against this young man to put in him in a position where he
4 had to admit to various things otherwise he would have never
5 gotten out of that State Police barracks. Do you believe
6 that? Do you believe that anybody is going to say, well,
7 you've broken four or five bones on a little baby but I'll
8 talk to the D A and you'll get off with a fine for breaking
9 four or five bones of a little baby. Again, that's the
10 conspiracy that was engaged in by the State Police to harm
11 this defendant, to get him to testify to make admissions
12 against himself, and I'm responsible too because I made a
13 plea agreement with Mr. Setzer even though that plea
14 agreement had nothing to do with his testimony against Mr.
15 Bailey in this case.

16 And, of course, Lori we can talk a great deal about
17 Lori's culpability. She's no angel. Frankly I'm appalled by
18 this situation where somebody who goes to the hospital with
19 her child is told by the doctor that this child has been the
20 victim of child abuse, has had all these things happen to
21 her, recognizing this person has a serious anger problem,
22 recognizing that the child is afraid of this person and
23 continued to live with this person for more than another
24 year. I'm really appalled by that and but again that has
25 nothing to do with this particular case. We're dealing here

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1 with Mark Bailey. It's a disgusting situation that's
2 occurred.

3 In considering all the issues before us today the Judge
4 again will tell you to use your common sense in applying the
5 concept of reasonable doubt and your life experiences. You
6 have your life experiences as I have. How many of you have
7 known children with broken bones before they were 8 months
8 old except those maybe that were injured at birth or injured
9 in some particular type of accident. How many of you have
10 known a child who isn't even 8 months old that didn't have
11 some kind of disease problem that had five or six broken
12 bones by the time that child was 8 months old. You have to
13 consider that in terms of your life experiences whenever
14 you're considering all the facts and who is credible in this
15 case because again the credibility of the defendant and every
16 other witness here is something that's in your hands alone. I
17 think you have cause to question the credibility for instance
18 of Chad Setzer. And I suggest to you that if it might have
19 been real questionable on the part of the district attorney
20 to bring Chad Setzer to bring him in to testify except that
21 what Chad Setzer was essentially consistent with what Mark
22 Bailey said and also consistent with what happened. He wanted
23 to go to Warren. He did go to Warren. Whether it was him that
24 was involved or Mr. Fink that was involved one way or another
25 he went to Warren. He testified that the defendant was

A-387

1 holding the baby up in his hand and that the baby fell. Mr.
2 Setzer says he didn't want it to fall to the ground. Mr.
3 Bailey says he caught the child by the leg and pulled it into
4 his chest. Well, it's for you to determine the credibility of
5 Chad Setzer but keep in mind that what Chad Setzer said
6 doesn't stand alone. Again, it is the creditability of Mr.
7 Bailey that is the key matter in this case. At this point
8 he's a person who indicates that he cares about children
9 generally, he cares about Rebecca Moore. He doesn't care
10 enough about his own child to insist that he get his
11 visitation which are ordered by the court. He tells Amy
12 Tuttle back here that this incident occurred on September
13 19th, five days before he goes to the hospital. And when he
14 testifies here he says it occurred that very morning because
15 that's when Jennifer fell on Rebecca's leg. So did it occur
16 on the 19th or on the 24th? Are we saying it's the 24th
17 because that's what is convenient when it's time for child.
18 The incident when he held the child up in the air that
19 happened on the 23rd of September according to Mr. Bailey the
20 day before they went to the hospital the child wasn't hurt
21 until next morning whenever Jennifer fell on Rebecca. And the
22 part about the fine there's going to be a fine for breaking
23 this child's limbs and bones four or five times is that
24 believable? Would Sergeant Shirley and Bill Dawson do such a
25 thing? Is it believable that this person believed that he

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1 had to confess or he had to make admissions or else he
2 wouldn't get out of the state police barracks when there was
3 absolutely nothing that occurred that would prevent him from
4 leaving the state police barracks? Is it credible that he
5 made the statement that Trooper Dawson and Trooper Davis put
6 words into his mouth. Do you think it was Trooper Dawson who
7 told him to say that he dragged the child out of the car
8 seat? Do you think that it was Trooper Dawson who decided to
9 have him testify that he pulled the child out of the crib and
10 the crib vibrated because the child's leg or foot was caught
11 in the slat of the crib? I guess you're going to have to
12 make a decision or you will, you don't have to make a
13 decision. Is Mark Bailey is he just a pathetic human being?
14 Is he someone who is sick that can't control himself and
15 can't control his anger or is he an evil sadistic person who
16 enjoys inflicting pain on a child? You can debate that for
17 yourselves. I would suggest to you for the purpose of this
18 proceeding it doesn't matter. It doesn't matter. His lack of
19 control is not a defense.

20 The Judge is going to tell you that a person's mental
21 instability unless there is a claim of legal insanity or
22 other claim in a case such as this it doesn't matter. A
23 person who is not insane is responsible for his or her acts,
24 and I ask you to hold Mark Bailey responsible for his acts.
25 You know I would suggest to you that angry people don't

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1 belong taking care or having contact even with little
2 children. This man is smashing windshields because he can't
3 control his anger, and he is a man who is an abuser of babies
4 like Rebecca Moore because he can't control his anger. This
5 is an unstable and angry and a violent person. You know
6 there's nothing more defenseless than a human baby. Every
7 other species has some form of defense mechanism when it's an
8 infant other than human babies, and in this case he has taken
9 it out on the most defenseless of human beings, a child less
10 than 8 months old. So I'm asking you at this point, I'm
11 submitting to you all the evidence points to this interest
12 for justice for Rebecca Moore. I'm asking you to return a
13 verdict of guilty on each count with which Mr. Bailey is
14 charged.

15 MR. FINK: May I approach, Your Honor?

16 THE COURT: Thank you, Mr. Leber. Counsel
17 may approach.

18 MR. FINK: If Your Honor, please I would like
19 to take exception to the district attorney's comments that he
20 disagrees with the law as I stated it to the jury in that,
21 quote, as I understood him to say, quote he don't have to
22 prove that defendant committed a crime beyond a reasonable
23 doubt.

24 MR. LEBER: For the purpose of corpus delecti
25 rule.

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1 MR. FINK: I did not hear that. I don't
2 think you said it. If you did, it's my hearing. I don't
3 think you said for the purpose of corpus delecti rule.

4 MR. LEBER: Certainly it was in that context.

5 MR. FINK: Well, I know it's a completely
6 misleading statement.

7 THE COURT: Well, actually I don't give a
8 damn one way or other what you say I shouldn't say, damn, I
9 don't give a darn. If anybody is going to screw it up, I get
10 first dibs on screwing it up.

11 MR. FINK: Okay. I felt I had to take
12 exception to it, and I do take exception to the District
13 Attorney commenting that the jury could consider that
14 Jennifer didn't have a problem until after she came, after
15 the defendant came to live with them. That is extremely
16 prejudicial. There's been no charge whatsoever concerning
17 Jennifer against the defendant and I just think it's highly
18 improper.

19 THE COURT: You want to comment?

20 MR. LEBER: Except that it's part of the
21 evidence in the case that came in. I think it came in
22 through you.

23 THE COURT: There were--I could read through
24 this 25 pages of notes, which I'm not going to do now. There
25 were references to Jennifer's reactions to Mr. Bailey,

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1 however, I do feel a little clarification to the jury is
2 necessary in that we want to emphasize that alleged victim is
3 not Jennifer and whatever, as to any suggestions that she may
4 have been injured at the hands of Mr. Bailey they should be
5 completely disregarded because it's not in the case. Anything
6 else?

7 Here's what I did on the verdict slip I
8 printed it. I just tried to track the bill of particulars,
9 that's my printing thereafter with regards.

10 MR. FINK: There is a question about one and
11 two. The first doctor testified that, as I recall, that
12 there was a total, I think a total of five, I have differing
13 numbers, and Dr. Supinski after looking up in the light, I
14 think, only saw one as opposed to two and the mere fact that
15 there are four charges does not necessarily mean that
16 testimony--

17 THE COURT: No, what I did.

18 MR. FINK: I have a problem.

19 THE COURT: Frankly, there's three doctors
20 they weren't totally consistent on that stuff. So what I
21 basically did I put the Commonwealth to the test. I used the
22 bill of particulars, what they alleged in the bill of
23 particulars. So I think they're stuck with it if it's wrong.

24 MR. LEBER: Yeah, I think, well, I think the
25 testimony of the doctors was more consistent than

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1 inconsistent.

2 THE COURT: Well, yes, there was a question
3 of hair line or was this recovering.

4 MR. LEBER: For instance, the right ankle
5 injury I don't think Dr. Dallaire said that. I think she
6 treated tibia fibula being one fracture, whereas Dr. Supinski
7 was referring to it as two fractures and I don't know.
8 Frankly I don't know.

9 MR. FINK: But down in the verdict slip
10 that's one incident and then the second one also goes to the
11 right tibia and I have a problem with that. There's a
12 question of whether or not there was a--now Dr. Supinski did
13 testify that there were different.

14 THE COURT: There was, I felt there was, that
15 there were. It was either a conflict or else they were
16 saying that it was inconclusive on this, there was definitely
17 this and maybe this.

18 MR. LEBER: I think the only thing maybe that
19 existed was the ankle of the left leg if you fared it all
20 out.

21 THE COURT: Alright why don't we do this.

22 THE COURT: Ladies and gentlemen of the jury,
23 in the course of closing remarks there was references made to
24 Jennifer Moore, who apparently is Rebecca's older sister. I
25 want to point out to you that Jennifer is not alleged to be a

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1 victim here, and to the extent it has been suggested that she
2 is in some manner involved or a victim of any criminal acts
3 attributed to the defendant, to the extent that has been
4 suggested you should totally and completely disregard it.
5 This case has allegations of multiple incidents, which I'll
6 get into, but it has essentially an allegation of one
7 defendant and one victim.

8 Ladies and gentlemen, it is now my duty to charge you
9 on the law as it applies to this case. I know you've been
10 here for a couple of pretty long days and I genuinely
11 appreciate the patience that you have shown and the interest
12 that you have given both to the Commonwealth and the Defense
13 as well as the Court as we have gone through these several
14 days.

15 Very shortly it will become your function to decide
16 this case solely on the basis of the facts as they have been
17 presented here in court and in accordance with the
18 instructions that I give you on matters of law. I want you
19 to decide this case fairly on the evidence and on the law. I
20 will not be making a lot of specific references to the
21 evidence as both counsel did quite properly during the
22 closings, however, I want you to carefully consider all of
23 the evidence in the case and if your recollection differs
24 from mine or from that of either counsel than you correct any
25 mistakes you think were made on the power of your own

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1 recollection.

2 You are the sole judges of the facts, you are to
3 determine what are the true facts in this case under the
4 evidence, and when you have done so you are to apply those
5 facts to the rules of law that I outline to you and then of
6 course you will deliberate on a verdict. A fundamental
7 principle of our system of criminal justice in this country
8 and in this state is that the defendant comes into court
9 presumed to be innocent. The fact that there was an arrest,
10 we've had various proceedings, we've brought all you in and
11 we've had a trial, none of that process in itself is any
12 evidence against the defendant. The defendant keeps that
13 presumption of innocence throughout the trial and loses it
14 only if you conclude that he has been proven guilty of some
15 or all of the charges beyond a reasonable doubt. Now, if the
16 Commonwealth evidence does arise to the level of proof beyond
17 a reasonable doubt than the presumption of innocence is gone
18 and you may convict. You should however, remember that burden
19 of proof in this criminal case and in all criminal cases is
20 on the Commonwealth and that is to prove guilt beyond a
21 reasonable doubt. Although the Commonwealth has this burden
22 of proof beyond a reasonable doubt I want you to understand
23 that is not absolute, and what I mean by that is that
24 Commonwealth is not required to prove its case beyond all
25 doubt or to a mathematical certainty. Neither is the

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1 Commonwealth required to demonstrate for you the complete
2 impossibility of innocence.

3 What is a reasonable doubt? It is indeed true there's
4 probably been several centuries of legal debate that quantify
5 that what I'm going to give you are fairly basic definitions
6 in a moment. I want you to think about the concept because I
7 think you will find that even though I don't believe any of
8 you have been in law school and perhaps have heard this
9 explanation before I think you'll find that you know the
10 concept because it's likely that you have applied it at other
11 times in your life and situations other than jury duty. I say
12 that because a reasonable doubt is a doubt that would cause a
13 reasonably careful and sensible person to hesitate before
14 acting on a matter of the utmost importance in his or her own
15 affairs. But I caution you, ladies and gentlemen, a
16 reasonable doubt has to be a real doubt. You do not have the
17 luxury as jurors of manufacturing that out of thin air to
18 avoid carrying out a difficult or perhaps even distasteful
19 duty. Again, the test here is not suspicion it's proof beyond
20 a reasonable doubt.

21 As judges of fact you are the judges of the credibility
22 of the witnesses and their testimony. And what I mean by
23 that, picks up on some of what I talked about yesterday
24 morning, that you have to look at each witness and judge the
25 truthfulness and accuracy of each witness' testimony and then

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1 of course you've got to decide whether you're going to
2 believe some or all or none of that testimony. There are some
3 factors that are generally recognized as assisting the jury
4 in making determinations of credibility. In other words, of
5 believability, truthfulness and accuracy. They're
6 essentially a list of questions that you should ask
7 yourselves relative to the testimony of each witness. And I
8 think you'll find the answers to these questions may help you
9 make those factual determinations on credibility. Those
10 questions that I commend to you are as follows:

11 Was the witness able to see, hear, know and remember
12 those matters about which he or she testified? How well did
13 the witness describe and remember those matters about which
14 he or she testified? Is the ability of the witness to see,
15 hear, know and remember affected by youth, by advanced age or
16 by some physical or mental or intellectual problem? Did a
17 witness testify convincingly? How did the witness look, act
18 and speak while on the witness stand? Was the testimony
19 uncertain? Was it confusing? Was it evasive? Was it
20 selfcontradictory? Does the witness have some bias, some
21 prejudice or some other motive in this case that might effect
22 his or her testimony? How well does the testimony of a
23 witness square with the other evidence in the case, including
24 the testimony of other witnesses? Is it contradicted? Is it
25 supported by other testimony and evidence? Really big

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1 question, ladies and gentlemen, does it make sense? If you
2 find that some portion of the witness' testimony is
3 inaccurate, than of course you got to decide whether that
4 inaccuracy casts some sort of doubt on the rest of that
5 witnesses testimony. That can depend on whether the witness
6 has been inaccurate on some minor detail and also on a
7 possible explanation for that inaccuracy. For instance, did a
8 witness make an honest mistake as they occasionally do? Did
9 a witness forget as they occasionally do? Or did a witness
10 deliberately falsify? Which also I'm sorry to say does
11 happen sometimes. As judges of credibility and finders of
12 fact you as jurors are responsible for giving the testimony
13 of every witness and for all the other evidence in the case
14 whatever credibility and whatever weight you feel it
15 deserves.

16 In this case the defendant, Mr. Mark Bailey, did take
17 the stand and testify as a witness. In considering his
18 testimony you should use the general instructions, the
19 factors that I've outlined to you for judging credibility of
20 individual witnesses. You are not to disbelieve the defendant
21 because he has a vital interest in the outcome of the trial
22 but on the other hand you can properly consider that vital
23 interest along with all other appropriate facts and
24 circumstances bearing on the defendant's credibility. If you
25 find that there are conflicts in the testimony, then of

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1 course you have the duty of sorting out and deciding which of
2 conflicting testimony to believe and which to reject. But
3 before you reach that stage, ladies and gentlemen, I want you
4 to try and reconcile, or in other words, fit all the
5 testimony together if you can do so. Those discrepancies and
6 conflicts may or again may not cause you to disbelieve
7 testimony of different witnesses who have given conflicting
8 testimony. Remember, a lesson of human nature is that two or
9 more persons witnessing an incident or recalling an incident
10 can make an innocent mistake in terms of what happened. If
11 you can't fit the testimony together, than of course you've
12 got to decide what to accept and what to reject. Before you
13 do that look at whether the conflict is something minor,
14 something more substantial and whether it arises out of some
15 innocent mistake or unintentional falsehood. Take the same
16 factors that I talked about, which I suggested you use to
17 evaluate the testimony of an individual witness and ask
18 yourself those questions over again if you find that you
19 cannot otherwise reconcile the testimony of conflicting
20 witnesses.

21 The speeches of the attorneys, arguments they make to
22 you are not evidence and I don't want you to consider them as
23 evidence. However, when you are debating the case consider
24 the arguments of counsel carefully. You need to understand
25 that each attorney has a specific duty to come in and argue

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1 and make presentation on behalf of the side of the case he
2 represents. You can be guided by the arguments of counsel if
3 they meet two tests. First, if they are supported by the
4 evidence, and secondly, if they appeal to your sense of
5 reason and good judgment. Nothing, however, requires you to
6 accept the arguments of either attorney.

7 The defendant here is charged with a total of 12 counts
8 relating to three separate offenses, it being alleged that
9 the defendant committed each offense on four occasions. Some
10 of these relate to what we call assaultive conduct, some of
11 the alleged offenses, and I want to give you a couple
12 definitions here which will hopefully assist you, and I'll be
13 making reference to those in just a moment. One of the
14 definitions is bodily injury. Bodily injury means impairment
15 of physical condition or substantial pain. The second term I
16 want to mention to you is serious bodily injury, which means
17 impairment of physical condition creating a substantial risk
18 of death or which causes serious permanent disfigurement or
19 causes protracted loss of or impairment of the function of
20 the bodily member or organ.

21 Defendant is charged with four counts of aggravated
22 assault relating to an allegation of causing serious bodily
23 injury. In order to find the defendant guilty of aggravated
24 assault you must find that the following elements of the
25 crime have been established beyond a reasonable doubt. There

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1 are three elements. First, that the defendant caused serious
2 bodily injury, as I just defined that term, to the youngster,
3 Rebecca Moore. Secondly, that the defendant acted
4 intentionally, knowingly or recklessly under circumstances
5 manifesting extreme indifference to the value of human life.
6 A person acts intentionally with respect to serious bodily
7 injury when it is his conscious object or purpose to cause
8 such injury. A person acts knowingly with respect to serious
9 bodily injury when he is aware that it is practically certain
10 that his conduct will cause such a result. A person acts
11 recklessly with regard to serious bodily injury when he
12 consciously disregards a substantial and unjustifiable risk
13 that serious bodily injury will result from his conduct. The
14 risk must be of such a nature and degree that considering the
15 nature and intent of the defendant's conduct and the
16 circumstances as known to him its disregard involves a gross
17 deviation from the standard of care that a reasonable person
18 would observe in the defendant's situation.

19 The defendant is charged with four counts of simple
20 assault, and I want you to try to make a distinction here
21 because simple assault can be proved two different ways for
22 the purposes of the case. Defendant is charged in Counts 5
23 through 8 with attempting to cause or intentionally or
24 knowingly or recklessly causing bodily injury to another.
25 What that means is that this offense can be proven by

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1 essentially two different methods, one that bodily injury was
2 attempted and the other that bodily injury was caused.
3 There's a little distinction here I want to go over with you.
4 Defendant is charged with the crime of simple assault bodily
5 injury attempted. In order to find the defendant guilty of
6 that offense you must find the following elements have been
7 proven beyond a reasonable doubt. First, that the defendant
8 engaged in conduct which constituted a substantial step
9 toward causing bodily injury to Rebecca Moore, and secondly,
10 that the defendant's conduct in this regard was intentional
11 or in other words that it was his conscious object or purpose
12 to cause such bodily injury. And again when I refer to
13 bodily injury I make reference to first definition I gave you
14 a couple minutes ago, that's one way simple assault can be
15 proven. It also can be proven by the concept of simple
16 assault bodily injury caused. In order to find the defendant
17 guilty of simple assault under this variation the following
18 elements must be proven beyond a reasonable doubt. One, the
19 same as before, that the defendant caused bodily injury to
20 Rebecca Moore. Secondly, that, this is going to sound very
21 familiar, pick up something now from aggravated assault, that
22 the defendant's conduct in causing that bodily injury was
23 either intentional or knowing or reckless. And again a
24 person acts intentionally with regard to bodily injury when
25 it is his conscious object or purpose to cause that injury. A

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1 person acts knowingly with respect to bodily injury when he
2 is aware that and it is practically certain that his conduct
3 will cause such a result. And finally a person acts
4 recklessly with regard to bodily injury when he consciously
5 disregards a substantial and unjustifiable risk that bodily
6 injury will result from his conduct. Again that risk must be
7 of such a nature and degree that considering the nature and
8 intent of the defendant's conduct and circumstances as known
9 to him its disregard involves a gross deviation from a
10 standard of conduct that a reasonable person would observe in
11 the defendant's situation.

12 In Counts 9 through 12 the defendant has been charged
13 with the offense of Endangering the Welfare of a Child. In
14 order to find the defendant guilty of that offense you must
15 find that following elements have been proven beyond a
16 reasonable doubt. One, that defendant endangered the welfare
17 of a child by violating the duty of care or protection, of
18 course, the child in question is again Rebecca Moore.
19 Secondly, that the defendant endangered the welfare of a
20 child knowingly, in other words that he was aware that his or
21 practically certain that his conduct would cause a particular
22 result. Next, that defendant was a person supervising the
23 welfare of a child and finally that the child was under the
24 age of 18 at the time of the alleged endangerment.

25 The evidence in this case, ladies and gentlemen, is

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1 essentially of two different types. On one hand, there is
2 direct evidence, which is testimony from a witness based on
3 his or her own personal knowledge, such that is something
4 that a person saw or heard himself. The other type is
5 circumstantial evidence, which is testimony about facts which
6 point to the existence of other facts which are ultimately in
7 question. Whether or not circumstantial evidence is proof of
8 the facts ultimately in question depends on the application
9 of common sense, ladies and gentlemen, and human experience.
10 Sometimes just by the virtue of the way crimes can be
11 committed it is necessary to rely on circumstantial evidence.
12 In deciding whether or not to accept circumstantial evidence
13 as proof of the facts in question you must be satisfied first
14 of all that a witness is testifying truthfully and accurately
15 and that secondly that the existence of the facts as
16 testified to by the witness naturally and logically lead to
17 the conclusion that facts ultimately in question also
18 occurred. I will instruct you that circumstantial evidence
19 alone may be sufficient to prove defendant's guilt. If there
20 are various pieces of circumstantial evidence it is not
21 required that each piece by itself prove guilt beyond a
22 reasonable doubt. Instead before you can find the defendant
23 guilty all the pieces of circumstantial evidence considered
24 together must naturally and reasonably lead to the conclusion
25 that the defendant is guilty beyond a reasonable doubt. In

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1 other words, you can find the defendant guilty solely on the
2 basis of circumstantial evidence if the amount and quality of
3 that evidence convince you of guilt beyond a reasonable
4 doubt.

5 Now, in this case a number of persons were accepted and
6 permitted to testify as expert witnesses. I can think of
7 three I can't remember if some of the other people were
8 accepted as experts or not. I'm talking of Dr. Dallaire,
9 Dr. Supinski and Dr. Asar. An expert witness is a person who
10 has some special skill or knowledge in a science, art or
11 profession or subject that the witness has acquired by virtue
12 of training, education and experience. Because an expert has
13 special knowledge, that is to say somewhat out of the
14 ordinary that witness may be able to supply jurors with
15 specialized information, explanations and opinion that would
16 assist a jury in deciding the case. Regular witnesses have
17 certain limitations that do not apply to experts. Regular
18 witnesses can generally testify about things that they see,
19 personal things that they saw or heard, and secondly, regular
20 witnesses are limited because they're not allowed to express
21 opinions on matters that require some special skill or
22 knowledge. On the contrary an expert witness is allowed to
23 express opinions on a matter that is within that witness'
24 area of expertise. Furthermore, an expert witness can base an
25 opinion on things that are personally perceived or may base

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1 an opinion on factual information learned from other sources
2 such as other witnesses, photographs or whatever. If an
3 expert witness bases his opinion on things not personally
4 perceived, he can describe the information in which he relies
5 and identify the source by expressing an opinion. You as
6 jurors are, as obviously emphasized to you several times, the
7 judges of credibility and you decide how much weight to give
8 to the testimony. The fact we have accepted certain persons
9 in this courtroom and allowed them to testify as experts does
10 not mean that their testimony and their opinions are always
11 right. When you're considering credibility and weight of
12 expert testimony and opinions consider all the factors
13 relating to credibility that I've already gone over, but
14 consider all other things bearing on credibility and weight
15 including the training, education and experience and ability
16 of each expert, the information upon which an opinion was
17 based, the source and reliability of that information and the
18 reasonableness of any explanation given to support an
19 opinion.

20 Sometimes a witness is asked to answer hypothetical
21 questions and I believe that occurred here. An expert may be
22 told by counsel to assume certain facts and to express an
23 opinion based on that assumption, that's what we call
24 hypothetical questions. The value of an opinion given in a
25 response to hypothetical question depends on various things

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1 including how close the assumptions made are to the true
2 facts. One of your tests as jurors is to determine from all
3 the evidence whether or not the testimony assumed for a
4 hypothetical question has been proven to be true. If you find
5 that any of the assumed facts or testimony have not been
6 proven, than you must determine how that affects the weight
7 and value of an expert witness' opinion.

8 Ladies and gentlemen, in a case such as this the mental
9 soundness of the defendant is not a matter for your
10 consideration. The issue of mental soundness of a defendant
11 who is charged with a crime is an offense only if the actor
12 factor is legally insane. In this case no such claim has
13 been made before you, accordingly the mental soundness of the
14 defendant is not a matter for consideration by this jury.

15 You heard some testimony, I believe, this morning that
16 one of the witnesses, a Chad Setzer had some previous
17 criminal convictions, including one I recall relating to
18 theft or conspiracy to commit theft. That information was
19 provided to you only for the purpose of allowing you to
20 decide whether or not to believe all or part of Mr. Setzer's
21 testimony. In so doing you can consider the type of crime
22 that he acknowledged committing--how long ago it was
23 committed and how likely it is that the, how likely it is
24 that his past crime would effect the truthfulness of his
25 testimony in this case.

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1 Now, in this case the Commonwealth has introduced
2 evidence of various statements which they claim were made by
3 the defendant. Before you can consider the statements as
4 evidence against the defendant you must first of all find
5 that the crime was in fact committed and that the defendant
6 did in fact make the statement, otherwise it must be
7 disregarded. You may not consider the statements of the
8 defendant as evidence against the defendant unless you find
9 that the crimes in question were committed. This means that
10 you must disregard the statement attributed to the defendant
11 unless you are satisfied beyond a reasonable doubt by other
12 evidence in the case, that is to say other evidence outside
13 of the alleged statements that a crime was committed, or that
14 an injury was sustained in the process of committing a crime,
15 that crime being committed by someone. The other evidence
16 does not need to show that the crime was in fact committed by
17 the defendant only that crime was committed by someone. The
18 other evidence does not need to rule out all possibilities of
19 accident, justification or excuse or non criminal means. It
20 is enough if you are satisfied beyond a reasonable doubt that
21 the circumstances are more consistent with the injuries
22 having resulted from the crimes that I outline to you than
23 from other means. Again, the evidence does not need to tend
24 to show that the crime was committed by the defendant only
25 that a crime was committed by someone. Other evidence does

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1 not need to rule out the possibility there might be some
2 defense. There's enough if you are satisfied beyond a
3 reasonable doubt that the circumstances are more consistent
4 with the commission of a crime than with the non commission
5 of a crime or existence of a defense. In other words you have
6 to make that determination beyond a reasonable doubt before
7 you can consider the alleged statements attributed to the
8 defendant. Another way of saying that, is that before the
9 defendant's admissions can be considered as evidence of guilt
10 you as jurors must first be convinced beyond a reasonable
11 doubt that the injuries allegedly suffered here were caused
12 by the crime charged or the crimes I should say in this case.
13 And you have to of course make that determination beyond a
14 reasonable doubt.

15 I promise to stop talking momentarily. You've listened
16 to a lot of people today, but I do want to give you some
17 brief final guidelines which I hope will help you with your
18 deliberations. I remind you it's my responsibility to decide
19 all questions of law and you are obligated to follow the
20 rulings I have made in court and the instructions I have
21 given you on matters of law. That's because none of us are
22 free to change the law whether we agree or disagree with it.
23 I don't become involved, however, in deciding the facts; that
24 is completely the province of the jury. Again, your function
25 is to consider the evidence, find the facts, apply the facts

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1 to the law as I have outlined it to you, then to deliberate
2 on a verdict.

3 This is a matter of considerable importance, ladies and
4 gentlemen. As I said we're up here in Coudersport,
5 Pennsylvania tonight. Now that it's dark you can probably
6 shoot a cannon down the street and not hit too many people.
7 The fact we're up here in God's Country doesn't diminish from
8 the tremendous importance of this case to the Commonwealth
9 and to the defense. You have a responsibility to perform your
10 duties and to reach a verdict based upon the evidence as it
11 was presented to you during the trial and in accordance with
12 the law as I have explained it to you. However, in
13 determining the facts I want you to apply your common sense
14 and also to draw on your own every day knowledge and
15 experience in life that each of you has accumulated. You are
16 required, of course, to keep your deliberations free from any
17 bias or prejudice. To go back to a point I made yesterday
18 morning, do not concern yourselves with the future
19 consequences of your verdict including what might happen to
20 the defendant in terms of penalty should he be convicted of
21 any or all of these offenses. If that were to occur, it is
22 my function as trial Judge to choose a lawful and appropriate
23 penalty and you, ladies and gentlemen, are not involved in
24 that part of the case or consulted. For that reason the
25 possibility of a penalty being imposed should have nothing to

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1 do with your decision as to whether or not the defendant has
2 been proven guilty beyond a reasonable doubt.

3 First thing you do when you go upstairs is to select
4 one of your group to act as a foreperson. That person can
5 start the deliberations going and will also announce the
6 verdict of the jury when you return to the courtroom. This
7 being a criminal court matter your verdict has to be
8 unanimous to be valid. You all have to agree. You have a duty
9 to deliberate with each other and consider each others views
10 with the goal of reaching an agreement if you can do that
11 without doing violence to your own personal judgment.
12 However, nobody is required to surrender an honest and firm
13 conviction as to what the verdict should be. What I mean by
14 that is that when it's all said and done you each have to
15 make up your own minds, but when you do that give full
16 consideration to the views of your fellow jurors.

17 Finally, I want to ask you to extend to each other the
18 same courtesy and respect you've shown through out this two
19 day trial and same courtesy and respect that you extend to
20 other people you encounter in your day to day lives. You are
21 here as an important and constitutional part of the
22 government of the Commonwealth of Pennsylvania and you have a
23 very significant duty about to descend upon you. In
24 performing that duty you have to leave some things behind.
25 All prejudices are out the door, all biases are out the door

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1 and, ladies and gentlemen, your sympathy is out the door too.
2 You are to decide this case solely on the basis of the
3 evidence presented and in accordance with these instructions
4 I have given you on matters of law.

5 You've been a wonderful group to have here these last
6 several days. You've probably seen more of me and rest of
7 the participants than you wanted to. It has been a pleasure
8 to work with you thus far. We'll be sending you out with a
9 couple exhibits and a verdict slip and I need to explain the
10 verdict slip because part of it is typed and part of it is
11 not typed. The part that is not typed is my printing. I
12 print because if I wrote none of you could read what I wrote.
13 Using the basic allegations made by the Commonwealth I have
14 tried to separate the charges here a little bit. The verdict
15 slip reads as follows.

16 And now, December 17, 1997, we the jurors impaneled in
17 the above entitled case find the defendant as to 1.
18 Aggravated assault, then I've written in September 1996 right
19 tibia and fibula, 2. Right tibia. 3. Aggravated Assault,
20 left tibia and 4. Aggravated Assault relating to rib injury.
21 I've attempted to label those as best I could in accordance
22 with the assertions made by the Commonwealth as they are the
23 ones who are seeking the verdict of guilty, and of course the
24 defense is seeking a verdict of not guilty. I quantify the
25 four counts of Simple Assault and four counts of Endangering

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1 Welfare of Children the same way. What that means is the
2 foreperson has to write the verdict, the word guilty or words
3 not guilty in whatever combination you deem appropriate
4 twelve times and then the foreperson has to sign at the
5 bottom.

6 Ladies and gentlemen, jurors often wonder here it is
7 5:30 how long does all this take? And the answer is I'm not
8 sure. Some jurors reach verdicts very quickly, in a matter of
9 few minutes and others take a long, long time. We take it as
10 we go. I don't keep jurors here all night. We don't starve
11 you into a verdict. We'll send you upstairs for about five
12 or ten minutes and Mrs. Somogyi is going to tap on the door
13 and come in, ask if you'd like to order dinner. If so, we
14 have a menu upstairs. We'll serve you dinner upstairs so you
15 can work and be our guests for dinner. If it takes you short
16 while, that's fine. If it takes a you a long time, that's
17 fine. If it gets later on in the evening, I'll check see how
18 things are going with you. If you need to communicate, please
19 do so by written note, however, at no time should you divulge
20 to me where you stand in terms of numerical divisions on any
21 charges if that is in fact an issue. Anything counsel wishes
22 to place on the record?

23 Ladies and gentlemen, I'm presuming our first 12 jurors
24 are feeling okay and ready to proceed with deliberations. Is
25 that correct?

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1 (Alternate excused).

2 (Jury deliberated).

3 THE COURT: We'll note the time as being
4 6:10. District Attorney and Defense counsel are all present.
5 I was handed a note a moment ago. "Could we have a simple
6 explanation of the main difference between aggravated assault
7 and simple assault." I'll do my best. I want to go back
8 though to a couple points we talked about before, and I want
9 to redefine a couple terms for you because some of the main
10 distinctions are in differences in the terms. Bodily injury
11 is a term and you will hear that with reference to the two
12 subdivisions, if you will, of simple assault. They involve
13 attempting to cause or intentionally, knowingly or recklessly
14 causing bodily injury, that's simple assault. It can be
15 proven by attempting to cause or knowingly or intentionally
16 or recklessly causing bodily injury, which brings us to one
17 of those distinctions. What is bodily injury? Bodily injury
18 means impairment of physical condition or substantial pain.

19 On the other hand, aggravated assault as it was charged
20 here involves a charge that serious bodily injury was caused
21 by the defendant. Serious bodily injury means impairment of
22 physical condition which creates a substantial risk of death
23 or which causes serious permanent disfigurement or protracted
24 loss or impairment of the function of any bodily member or
25 organ. And again for aggravated assault the defendant has to

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1 to have acted intentionally, knowingly or recklessly with
2 indifference to human life, and defendant has to have caused
3 bodily injury to Rebecca Moore. So that is the main
4 distinction. You cannot ignore any of the other elements of
5 the offenses but main distinction as it is charged here is
6 bodily injury, which is a component of simple assault under
7 either theory of simple assault or serious bodily injury,
8 which is a component of aggravated assault.

9 Anything further counsel wish to place on the record?

10 MR. FINK: Your Honor, I would respectfully
11 request, I don't know that it is within the parameter of the
12 question, but I would respectfully request behalf of the
13 defendant his Honor charge once again on the meaning of
14 intentional, knowing and reckless.

15 THE COURT: I'm happy to do that.

16 MR. LEBER: No objection to that, Your Honor.

17 THE COURT: For aggravated assault it is
18 necessary that there be serious bodily injury caused to minor
19 victim. It is also necessary that the defendant acted
20 intentionally, knowingly or recklessly under circumstances
21 manifesting extreme indifference to the value of human life.
22 Now a person acts intentionally with respect to serious
23 bodily injury if it is his conscious object or purpose to
24 cause serious bodily injury. Or a person can act knowingly
25 with respect to serious bodily injury if he is aware that it

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1 is practically certain that his conduct will cause such a
2 result. A person acts recklessly with regard to serious
3 bodily injury when he consciously disregards a substantial
4 and unjustifiable risk that bodily injury will result from
5 his conduct. The risk must be of such a nature and degree
6 that considering the nature and intent of the defendant's
7 conduct and circumstances as known to him its disregard
8 involves a gross deviation from a standard of care that a
9 reasonable person would observe under the defendant's
10 circumstances. So that's basically the definition of
11 aggravated assault. Picking up on the specific point you
12 wanted, again, simple assault there are two ways to be
13 proven, proven by bodily injury caused or bodily injury
14 attempted. If you are looking at from the point of view
15 bodily injury attempted, Commonwealth must prove that
16 defendant engaged in conduct which constituted a substantial
17 step toward causing bodily injury to Rebecca Moore and that
18 he did so intentionally. In other words it was his conscious
19 object or purpose to cause that bodily injury. Now, that's
20 bodily injury attempted. The other side of the simple
21 assault coin, if you will, is bodily injury caused, that is
22 first, that defendant caused bodily injury to Rebecca Moore
23 and secondly, that he did so intentionally, knowingly or
24 recklessly as I've just described those terms to you in
25 aggravated assault. So I hope we have shed some light on the

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1 darkness not pulled the shade down further. We'll get you
2 folks some dinner.

3 I'll direct the reporter to file the note with the
4 record of these proceedings. We will adjourn pending hearing
5 more from the jury.

6 (Jury returned with a verdict).

7 (Jury polled).

8 (Court was adjourned).

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ml 8/13/99

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA =

VS =

MARK BAILEY, APPELLANT =

1451 PITTSBURGH 1998

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and
judged by this Court that the judgment of the Court of Common
pleas of POTTER County be, and the same is
thereby AFFIRMED.

By the Court:

Eleanor R. Valecko

DEPUTY PROTHONOTARY

DATED: AUGUST 10, 1999

Exhibit A

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COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MARK BAILEY,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1451 Pittsburgh 1998

Appeal from the Judgment of Sentence February 4, 1998,
In the Court of Common Pleas of Potter County,
Criminal Division at No. 93 of 1997.

BEFORE: POPOVICH, LALLY-GREEN, JJ. and CIRILLO, P.J.E.

MEMORANDUM:

FILED: AUGUST 10, 1999

Appellant Mark Bailey appeals from the judgment of sentence entered by the Court of Common Pleas of Potter County, which followed appellant's convictions for four counts each of aggravated assault, simple assault and endangering the welfare of a child.¹ Herein, appellant questions whether counsel was ineffective for:

- 1) failing to preserve his challenges to the weight and sufficiency of the evidence for appeal;
- 2) failing to object to the trial court's finding that the prosecution had proven corpus delicti by a preponderance of the evidence and its consequent admission of appellant's inculpatory statements to the police into evidence.

¹ 18 Pa. C.S.A. §§ 2702, 2701 and 4304, respectively.

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- 3) failing to object to the trial court's instruction to the jury with respect to corpus delecti and failing to preserve this issue for appeal;
- 4) failing to present character testimony;
- 5) failing to object to the prosecution's introduction of evidence of unrelated bad acts and introducing evidence of appellant's unrelated prior criminal acts;
- 6) failing to request a curative instruction with respect to the evidence of unrelated bad acts; and
- 7) failing to object to improper arguments made by the prosecutor during closing argument.

Upon review, we affirm the judgment of sentence.

Facts and Procedural History

On September 24, 1996, the staff at Charles Cole Hospital treated Rebecca Moore, a then seventh-month old infant, for fractures to her leg. During the examination, the staff discovered that the infant previously had sustained other fractures to her legs and ribs. The examining physician suspected child abuse and reported the injuries to Children and Youth Services. The State Police interviewed appellant on February 28, 1997. Based upon his statement, the police filed the current charges against appellant.

At trial, the Commonwealth sought to introduce a tape recording of appellant's interview with the police. To establish corpus delecti, the Commonwealth proffered the testimony of three experts, who each testified that Rebecca suffered at least five fractures in an eight-week period and that

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the circumstances surrounding her injuries were highly consistent with child abuse.

Dr. Dellaire, a radiologist, and Dr. Supinski, an orthopedic surgeon, both testified to the number and age of the child's fractures. Supinski testified that the victim had sustained at least six separate fractures at various times throughout a time period greater than four weeks. These fractures included two in the child's right ankle which were less than two weeks old. They also included fractures in both the right and left lower leg which were 3 to 6 weeks old and two fractured ribs which were greater than six weeks old. Dellaire testified that the child suffered at least five fractures. These included one in the child's right ankle, which was less than 2 weeks old, and fractures in the left ankle, right lower leg, right rib and left rib, all of which were between one month and two months old in Dellaire's opinion.

Dellaire and Dr. Asar, a pediatrician, testified that the types of fractures led them to the conclusion that the injuries were consistent with child abuse. Both testified generally about their medical training in child abuse and particularly that the child's "corner" fractures in her ankles and rib fractures are thought to be highly consistent with child abuse unless explained otherwise.

Supinski testified as to the most likely causes of the injuries. Supinski first dismissed disease and vitamin deficiency as the likely sources of the fractures. He stated that the fractures of the victim's right ankle were most likely caused by traction, possibly by shaking the child. In Supinski's opinion, the remaining four fractures were most likely caused by direct blows each requiring 10 to 20 pounds of force. He testified that because this amount of force is greater than the muscle strength in the 6th to 7th month of age group, the non-ambulatory child was physically unable to injure herself in this manner. Based upon this, Supinski concluded [to] a degree of medical certainty that the child "was undergoing abuse and has had multiple injuries inflicted upon [her] by some other person or persons."

Finally, all three witnesses testified that the history given to the medical personnel was inconsistent with the child's right ankle fracture that prompted the child's mother to take the child to Asar. The explanation given for the fracture was that a sibling

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had fallen on the child's leg. Supinski testified that this explanation was not consistent with the type of fracture the child sustained. Asar testified that the child's mother gave her the impression that the injury happened the same day she sought medical assistance and that it later became known that the injuries occurred four days earlier.

Trial Court Opinion, 7/8/98, at 1-2. Based upon the experts' testimony, the trial court found that the Commonwealth proved, by a preponderance of evidence independent of appellant's statement, that a crime occurred. It therefore permitted the Commonwealth to introduce the recording of appellant's police interview in its entirety.

When the police questioned appellant about the victim's injuries, appellant admitted that he may have injured the infant accidentally. In response to Trooper William Dawson's inquiry regarding the infant's most recent injuries, he stated:

I was holding [her] up above my head in one hand, playing around with her[.] [S]he started to fall so I grabbed her leg and caught her with my other arm and pulled her into my chest so she wouldn't hit the floor.

Appellant attributed the victim's prior rib fracture to "being upset," "being angry" and "pick[ing] her up too hard." When discussing the infant's earlier leg fractures, he admitted, "[O]ne of them may have happened when I dragged her out of the car." Appellant rationalized he "was upset--bad day" and that he was not "of sound mind" at the time of the incident. Appellant attributed the third fracture in the infant's leg to an occasion when he pulled her out of the crib and caught her leg between the crib rails. Appellant

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admitted he was "upset" at the time of the incident, but could not recall why he was angry. Appellant explained, "I get upset over little, tedious things that I shouldn't get upset about. I just fly off the handle over ridiculous things."

During the second portion of the police interview, Trooper Dawson inquired whether appellant had previously received treatment and taken medication for his temper control problem. Appellant admitted he had received in-patient treatment at Bradford Hospital and taken medication to control his anger. When Trooper Dawson questioned whether appellant had problems keeping his temper with other individuals, appellant responded that he had physically abused his ex-girlfriend, Jodi Lynn Murray, as well as his current girlfriend, the victim's mother. Further, he admitted that he may have bruised Allen, the victim's brother, while they were "horsing around." Appellant, however, denied bruising another child in the household, the victim's sister, Jennifer.

The victim's brother Allen also appeared on behalf of the Commonwealth. The victim's brother witnessed one of the incidents appellant admitted to in his police statement. He testified that appellant "was in one of his mad attitudes" and abruptly yanked the infant out of her car seat.

In further support of its case, the Commonwealth presented witness Chad Seltzer, appellant's former cellmate in the Potter County Jail. He

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testified that while in jail, appellant admitted to him that he had been holding the infant in one hand and dropped her. Appellant informed Mr. Seltzer that the victim was a nuisance and had created problems between him and her mother. Additionally, appellant told Mr. Seltzer that he was attempting to transfer from the jail and into a mental ward.

Appellant's primary defense to the crimes charged was that he did not cause the infant's injuries. Alternatively, the defense argued that even if appellant inflicted the infant's injuries, he did not intend to harm the child. In support of this defense, Appellant presented the testimony of two witnesses and took the stand on his own behalf. The first witness, Michael Hicks, testified that he knew appellant for at least six years, observed appellant interact with the victim and other children and believed appellant interacted well with them. Upon cross-examination, Mr. Hicks admitted that appellant had a temper and took medication to control his anger. Mr. Hicks also had witnessed appellant strike his former girlfriend, Jodi Murray. Appellant's mother, the second defense witness, testified that appellant interacted well with children and that he loved them. Upon cross-examination, she admitted that appellant became agitated when his glucose level rose too high and that on several occasions, appellant, while agitated, had smashed the windshields of various vehicles. When he took the stand, appellant denied harming the infant. Appellant testified that he was a diabetic and became agitated when his blood-sugar level rose too high. He

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also asserted that he was incapable of harming a child. Upon cross-examination, appellant admitted that he had bashed automobile windshields on at least nine separate occasions. For example, appellant shattered the window of his truck with a crowbar after his girlfriend requested that he not drive it. On other occasions, appellant would use his bare fist to shatter the windshield.

Ultimately, the jury returned verdicts of guilty on each of the charges of aggravated assault, simple assault and endangering the welfare of a child. The trial court then sentenced appellant to an aggregate term of imprisonment of ten to twenty years. Appellant subsequently filed post-sentence motions, which the trial court denied. This timely appeal followed.

Standard of Review

The standard by which we review appellant's claims is well settled:

The threshold inquiry in ineffectiveness claims is whether the issue[,] argument [or] tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit; for counsel cannot be considered ineffective for failing to assert a meritless claim. Once this threshold is met we apply the "reasonable basis" test to determine whether counsel's chosen course was designed to effectuate his [or her] client's interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective. If we determine that there was no reasonable basis for counsel's chosen course then the accused must demonstrate that counsel's ineffectiveness worked to his [or her] prejudice. The burden of establishing counsel's ineffectiveness is on the Appellant because

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counsel's stewardship at trial is presumptively effective.

Commonwealth v. Pierce, 537 Pa. 514, 524, 645 A.2d 189, 194-95 (1994) (citations omitted). Where an appellant presents a claim of arguable merit, and there has been no evidentiary hearing in the trial court, we ordinarily remand to permit the parties to develop the record. **Commonwealth v. Savage**, 695 A.2d 820 (Pa. Super. 1997). Where, however, the record demonstrates the claims lacks arguable merit, or that no prejudice resulted, no evidentiary hearing is needed. See **Commonwealth v. Edmiston**, 535 Pa. 210, 237-38, 634 A.2d 1078, 1092 (1993).

Commonwealth v. Lebo, 713 A.2d 1158, 1163 (Pa. Super. 1998), *appeal denied*, 1999 Pa. Lexis 391 (Pa. Feb. 18, 1999).

Discussion

Appellant first claims trial counsel was ineffective for failing to object to the Commonwealth's failure to establish corpus delecti. He argues that the experts who testified that Rebecca was a victim of child abuse espoused a definition of "child abuse" which encompassed injuries by accidental means, and, therefore, their testimony was insufficient to establish corpus delecti. Alternatively, he argues that the expert testimony as to the cause of Rebecca's injuries was contradictory and, hence, insufficient to establish corpus delecti. Both arguments lack merit. As the trial court accurately explained:

The corpus delecti rule requires the Commonwealth to meet two distinct burdens. The first burden requires the Commonwealth to convince the Court by a preponderance of the evidence that the evidence independent of the defendant's confession shows a crime has occurred. See **Commonwealth v. Ahlborn**, 441 Pa. Super. 296, 301, 657 A.2d 518, 521 (1995); **Commonwealth**

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v. McMullen, 545 Pa. 361, ___, 681 A.2d 717, 722 (1996); **Commonwealth v. Byrd**, 490 Pa. 544, 556, 417 A.2d 173, 179 (1980). This is required to admit a defendant's confession into evidence. **See id.** The second burden requires the Commonwealth to convince the jury beyond a reasonable doubt that the evidence independent of the confession shows that a crime occurred. **See Ahlborn**, 441 Pa. Super. at 302, 657 A.2d at 521; **Commonwealth v. Fried**, 382 Pa. Super. 156, ___, 555 A.2d 119, 120 (1989). This is to allow the jury to consider the confession as evidence of the defendant's guilt. **See id.** The Commonwealth is not required to prove the identity of the person responsible for the crime and may use circumstantial evidence to prove corpus delicti. **See Commonwealth v. Persichini**, 444 Pa. Super. 110, ___, 663 A.2d 699, 702 (1995), **appeal granted in part**, 546 Pa. 595, 687 A.2d 819 (1997).

* * *

The corpus delicti requirement for the crime of endangering welfare of children has been met. "A parent, guardian, or other person supervising the welfare of a child under 18 years of age commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support." 18 Pa. Cons. Stat. Ann. § 4304(a) (West. Supp. 1998). The doctors' testimony showed that the person responsible for supervising the child either inflicted multiple injuries to the child or neglected the child to the extent that somebody else was able to do so. This is sufficient evidence to convince the court beyond a reasonable doubt that the injuries resulted from a violation of a duty of care or protection. By violating either of these duties, the supervising adult would be practically certain that his or her conduct was endangering the welfare of the child.

The corpus delicti was also established for aggravated assault. A person is guilty of aggravated assault if he or she "attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under conditions manifesting extreme indifference to the value of human life." 18 Pa. Cons. Stat. Ann. § 2702 (a)(1) (West. Supp. 1998). Serious bodily injury is defined as, "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ." 18 Pa. Cons. Stat. Ann. § 2301 (West. Supp. 1998). The expert testimony established that the child suffered serious bodily injury. The 4½

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to 7½ month-old child sustained at least five fractures over the course of more than four weeks. Two of these fractures were in the child's ribcage close to her lungs. This period of repeated injury to the child's fragile body was sufficient for the Court to conclude by a preponderance of the evidence and the jury to conclude beyond a reasonable doubt that the child faced a substantial risk of death.

The independent evidence also supports the Court's ruling by a preponderance of the evidence and the jury's finding beyond a reasonable doubt that someone at least recklessly caused the serious bodily injury to the child. That Dellaire's and Azar's definitions of child abuse did not exclude accidental and non-criminal causes is not determinative. It is not necessary for the Commonwealth to rule out all possibility that the act occurred by accidental or non-criminal means for the jury to find that corpus delicti was established beyond a reasonable doubt. **See Ahlborn**, 441 Pa. Super at 303, 657 A.2d at 522. The detailed testimony relating to the child's injuries, along with the inconsistent explanation given about the source of the most recent injury, was more than sufficient for the jury to be convinced beyond a reasonable doubt that the source of the child's injuries was neither accidental nor non-criminal.

Trial Court Opinion, 7/8/98, at 3-4.

We add only that appellant's alternative argument, which is based upon contradictions in the testimony of the Commonwealth's experts, is also without merit. Granted, Dr. Dellaire testified that he believed that Rebecca's leg injuries were caused by pulling and twisting whereas Dr. Supinski testified that he believed that the fractures were caused not by twisting, but by pulling, traction or a direct blow. Appellant seizes on this alleged inconsistency to argue that the expert testimony did not establish corpus delicti. We find any apparent inconsistency inconsequential, as both doctors agreed that the injuries were purposefully inflicted on the child. Further,

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they were in consensus that the injuries could have been caused by someone pulling on the child. In sum, appellant's assertions that the Commonwealth failed to demonstrate corpus delecti is without merit, and we will not hold counsel ineffective for failing to raise a meritless claim. **See *Commonwealth v. Durst*, 522 Pa. 2, 4, 559 A.2d 504, 505 (1989).**²

Appellant's second claim is that counsel was ineffective for failing to object to the court's instruction to the jury regarding the Commonwealth's burden of proof for the corpus delecti of the crimes charged. Specifically, appellant claims the instruction 1) "negated the reasonable doubt standard by qualifying the charge with a preponderance of the evidence standard," 2) failed to state it was the Commonwealth's duty to prove, beyond a reasonable doubt, the commission of the crimes charged and 3) improperly

² For these same reasons, we must reject appellant's challenges to the weight and sufficiency of the evidence. Appellant has failed to develop separately these two claims. Instead, he merely argues that the Commonwealth's failure to establish the corpus delecti of the crimes charged rendered the evidence insufficient to support the verdict and the verdict against the weight of the evidence. For reasons stated *supra*, we find that there was sufficient evidence of corpus delecti to admit appellant's statement to the police.

Likewise, we must reject appellant's challenge to the weight-of-the-evidence. Although appellant did not raise this issue in the court below, he attempts to avoid waiver of the issue by asserting that counsel was ineffective for failing to raise it. We, however, find that even if not waived, this claim would fail for lack of merit. Appellant's challenge to the weight-of-the-evidence depends upon his assumption that the trial court improperly admitted his statement to the police. For reasons stated *supra*, we find that the trial court properly admitted appellant's police statement. Hence, a challenge to the weight of the evidence based upon the erroneous introduction of his statement must fail.

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included the term "defense" in the context of a more likely than not standard.

[I]n reviewing a jury charge for reversible error, the charge must be read and considered as a whole. **Commonwealth v. Woodward**, 483 Pa. 1, 4, 394 A.2d 508, 510 (1978). If we conclude that the charge was erroneous, we will grant a new trial unless we determine the error to be harmless. **Commonwealth v. Story**, 476 Pa. 391, 405, 383 A.2d 155, 162 (1978). ... [T]he trial court's jury instruction will be upheld if it adequately and accurately reflects the law and is sufficient to guide the jury through its deliberations. **Commonwealth v. Early**, 377 Pa. Super. 219, 227, 546 A.2d 1236, 1240 (1988), **appeal denied**, 521 Pa. 629, 558 A.2d 531 (1989).

Ahlborn, 657 A.2d at 520.

The trial court instructed the jury as follows:

Now, in this case the Commonwealth has introduced evidence of various statements which they claim were made by the defendant. Before you can consider the statements as evidence against the defendant, you must first of all find that the crime was in fact committed and that the defendant did in fact make the statement, otherwise, it must be disregarded. You may not consider statements of the defendant as evidence against the defendant unless you find that the crimes in question were committed.

This means that you must disregard the statement attributed to the defendant unless you are satisfied beyond a reasonable doubt by other evidence in the case, that is to say other evidence outside of the alleged statements that a crime was committed, or that an injury was sustained in the process of committing a crime, that crime being committed by someone. The other evidence does not need to show that crime was in fact committed by the defendant, only that the crime was committed by someone. The other evidence does not need to rule out all possibilities of accident, justification or excuse or non-criminal means. It is enough if you are satisfied beyond a reasonable doubt that the circumstances are more consistent with the injuries having resulted from the crimes that I outline to you than from other means.

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Again, the evidence does not need to tend to show that the crime was committed by the defendant, only that a crime was committed by someone. Other evidence does not need to rule out the possibility there might be some defense. There's enough if you are satisfied beyond a reasonable doubt that the circumstances are more consistent with the commission of a crime than with the non-commission of a crime or existence of a defense.

In other words, you have to make that determination beyond a reasonable doubt before you can consider the alleged statements attributed to the defendant. Another way of saying that, is that before the defendant's admissions can be considered as evidence of guilt you as jurors must first be convinced beyond a reasonable doubt that the injuries allegedly suffered here were caused by the crime charged or the crimes, I should say, in this case. And you have to, of course, make that determination beyond a reasonable doubt.

N.T., 12/12/97, at 407-08.

Here, the trial court's instruction adequately explained that a "criminal conviction may not be based upon the extra-judicial confession of the accused unless it is corroborated by independent evidence establishing the corpus delicti." *Ahlborn*, 657 A.2d at 520-21. Further, it informed the jury as to the Commonwealth's burden of proof. The trial court instructed the jury at least four times that the standard was one of "proof beyond a reasonable doubt." We are unconvinced that the trial court's failure to state separately that it was "the Commonwealth's burden to prove corpus delicti beyond a reasonable doubt," rendered the jury instruction inadequate—especially when the trial court's initial instructions cautioned the jury to "remember that the burden of proof in this criminal case and all criminal

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cases is on the Commonwealth and that is to prove guilt beyond a reasonable doubt." **See Ahlborn**, 657 A.2d at 522 n. 5.

Also, we are not inclined to vacate the judgment of sentence merely because the trial court stated, "There's enough if you are satisfied beyond a reasonable doubt that the circumstances are more consistent with the commission of a crime than with the non-commission of a crime or existence of a defense." The trial court eliminated the ambiguity, if any, which arose from this statement when it continued with the instruction. The court continued,

In other words, you have to make that determination beyond a reasonable doubt before you can consider the alleged statements attributed to the defendant. Another way of saying that, is that before the defendant's admissions can be considered as evidence of guilt you as the jurors must first be convinced beyond a reasonable doubt that the injuries allegedly suffered here were caused by the crime charged or the crimes, I should say, in this case. And you of course have to make that determination beyond a reasonable doubt.

N.T., 12/12/97, at 408. We therefore reject appellant's claim that counsel was ineffective in failing to object to the charge. **See Durst**, 552 Pa. at 4, 559 A.2d at 505.

Likewise, we reject appellant's claim that trial counsel was ineffective for failing to present character or reputation testimony. To be entitled to relief on this basis, appellant must demonstrate 1) the existence and availability of the witness; 2) counsel's awareness of, or duty to know of the witness; 3) the witness's willingness and ability to cooperate and appear on

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behalf of appellant; and 4) the necessity of the proposed testimony in order to avoid prejudice. **Commonwealth v. Hall**, 549 Pa. 269, 291, 701 A.2d 190, 201 (1997), **cert. denied, Hall v. Pennsylvania**, ___ U.S. ___, 118 S.Ct. 1534, 140 L.Ed.2d 684 (1998). Appellant, however, has failed to identify witnesses that would have proffered testimony on his character and reputation. He also has failed to present affidavits or other documents to demonstrate that witnesses were available to testify at trial and willing to cooperate and appear on his behalf. Thus, appellant's third claim must fail.

Appellant's next ineffectiveness claim relates to the introduction of evidence of specific acts of prior misconduct. Although treated as a single claim in the argument section of appellant's brief, appellant actually raises a multitude of ineffectiveness claims relating to the introduction of evidence of his prior bad acts.³

³ In this section of his brief, appellant also raises a claim entirely unrelated to the introduction of prior bad acts, namely, that counsel was ineffective for failing to object to the testimony of former inmate Chad Setzer. Upon direct examination, Mr. Setzer testified that, while in jail together, appellant informed him that he felt animosity toward the victim and that he had dropped the victim on at least one occasion.

We find no error in counsel's failure to object to the admission of such statements. "[F]alse or contradictory statements by the accused are admissible since the jury may infer therefrom that they were made with an intent to divert suspicion or to mislead the police or other authorities, or to establish [] innocence, and hence are indicative of [consciousness of] guilt." **Commonwealth v. Meadows**, 553 A.2d 1006, 1010 (Pa. Super. 1989) (citations omitted). To the extent appellant's statements to Mr. Setzer regarding his hostility towards the victim contradicted his statement to police that the victim's injuries were accidentally inflicted, the statements appellant made to Mr. Setzer were admissible as prior inconsistent

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As a general rule, evidence of prior bad acts is inadmissible to prove that the accused committed the crime with which he is presently charged. **See e.g., Commonwealth v. Donahue**, 519 Pa. 532, 539-40; 549 A.2d 121, 125 (1988).

The disfavor for receiving proof of the character of a person as evidence that on a particular occasion that he acted in keeping with his disposition is strongly felt when the state seeks to show that the accused is a bad man and thus more likely to have committed the crime. The long-established rule, accordingly, forbids the prosecution, unless and until the accused gives evidence of his good character, to introduce initially evidence of the bad character of the accused. It is not irrelevant, but in the setting of jury trial the danger of prejudice outweighs the probative value.

This danger is at its highest when character is shown by other criminal acts, and the rule about the proof of other crimes is but an application of the wider prohibition against the initial introduction by the prosecutor of evidence of bad character. The rule is that the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character. There are numerous other purposes for which evidence of other criminal acts may be offered, and when so offered the rule of exclusion is simply inapplicable.

McCormick, *On Evidence*, § 190, pp. 447-48 (2d Ed., 1972) (quoted in **Donahue**, 519 Pa. at 540-43, 549 A.2d at 125).

We first consider appellant's allegations that defense counsel's introduction of prior criminal acts when he cross-examined two

statements. **See id.** Further, appellant's statements to Mr. Setzer bolstered the credibility of appellant's admission in his police statement that he had caused the victim's injuries.

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Commonwealth witnesses amounted to ineffectiveness. Appellant claims that trial counsel was ineffective for introducing evidence that appellant abused the victim's sister when he cross-examined the victim's mother and for eliciting testimony from the victim's aunt, Tammy Baker, that the victim's sister feared appellant. Appellant argues that because evidence of prior criminal activity is inadmissible, *see, e.g., Donahue*, 519 Pa. at 539-40; 549 A.2d at 125, it was improper for defense counsel to question these two witnesses about appellant's "unrelated criminal conduct."

Contrary to appellant's contentions, defense counsel never elicited testimony from the victim's mother or aunt regarding appellant's prior criminal activity or prior misconduct. Defense counsel did not speak of crimes, nor did he suggest that appellant may have caused the injuries of the victim's sister. Rather, defense counsel asked mother why she did not take the victim to the hospital immediately after she noticed the swelling and bruising of the infant's leg. Defense counsel's question never made mention of appellant's prior bad acts, nor did they suggest or imply that appellant inflicted these injuries. Mother responded that her other daughter had had similar bruises on her body in the past, and defense counsel questioned mother as to those similarities. Likewise, the questions defense counsel posed to the victim's aunt exploited the similarities between the injuries of the victim and the victim's sister but again, did not make mention of appellant's prior bad acts or unrelated criminal conduct. Hence, we find

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appellant's reliance upon the body of case law that prohibits the introduction of evidence of a defendant's prior criminal activity to be misplaced and, accordingly, reject this claim.⁴

The second set of allegations concern the prosecutor's redirect of these same witnesses. Appellant contends counsel was ineffective for

- 1) failing to object when the prosecutor asked the victim's mother whether Jennifer and the victim's bruises were similar; whether these bruises appeared on Jennifer only after appellant began to reside in the household; whether appellant had physically injured Jennifer; and whether Jennifer feared appellant; and
- 2) for failing to object when, on redirect, the prosecutor asked the victim's aunt whether Jennifer's bruises were similar to those of the victim.

Here, appellant opened the door to the area of the Commonwealth's inquiry on cross-examination, and the Commonwealth's questions were designed to dispel inferences raised by the defense. The defense's cross-examination of the victim's mother and aunt raised two inferences: One, that the victim was not a victim of abuse, but merely bruised easily; and two, that perhaps mother or another member of the household other than appellant inflicted the victim's injuries. Since appellant raised these issues

⁴ Appellant later asserts in this section of his brief that defense counsel improperly questioned the victim's mother about bruises she discovered on the victim's then infant sister Jennifer and about the similarity between their bruises. However, he cites no case law, other than the general rule that evidence of prior criminal acts is inadmissible, to support his assertions. Accordingly, we deem this claim waived. *See* Pa. R.A.P. 2119 (b); *see also Commonwealth v. Chandler*, 554 Pa. 401, ___, 721 A.2d 1040, 1044 (1998).

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on cross-examination, the prosecution was entitled to conduct "redirect on th[ose] issue[s] in order to dispel any unfair inferences." **Commonwealth v. Dreibelbis**, 493 Pa. 466, 479; 426 A.2d 1111, 1117 (1981) (*quoting Commonwealth v. Lewis*, 472 Pa. 235, 372 A.2d 399 (1977)); *see also Commonwealth v. Truesdale*, 502 Pa. 94, 98, 465 A.2d 606, 608 (1983); **Commonwealth v. Billa**, 521 Pa. 168, ___, 555 A.2d 835, 841 (1989). As the Commonwealth's questions were properly within the scope of redirect examination, counsel had no basis to enter an objection. *See Commonwealth v. Webb*, 491 Pa. 329, ___, 421 A.2d 161, 165 (1980) (holding that counsel will not be deemed ineffective for failing to make baseless or fruitless objections).

The third set of allegations concern the Commonwealth's cross-examination of witnesses for the defense. Appellant contends that trial counsel was ineffective for:

- 1) failing to object when the prosecution questioned defense witness Michael Hicks as to appellant's violent temper, an occasion when appellant struck his former girlfriend and an occasion when Mr. Hicks counseled appellant about his physical abuse of others; and
- 2) failing to object when the prosecution elicited testimony from appellant's mother that appellant had struck his former girlfriend, been institutionalized, taken medication for his temper control problem and smashed the windshields of automobiles on nine separate occasions.

In **Commonwealth v. Adams**, 626 A.2d 1231 (Pa. Super. 1993), *appeal denied*, 535 Pa. 672, 636 A.2d 631 (1993), this court explained:

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A distinction is drawn between cases where it is sought to prove particular acts of misconduct and those where the purpose of the examination is to test the accuracy of the testimony by showing either that the witness is not familiar with the reputation concerning which he has testified or that his standard of what constitutes good repute is unsound. **Commonwealth v. Becker**, 326 Pa. 105, 114, 191 A. 351, 356 (1937). Evidence of the former is inadmissible. Evidence of the latter may be shown, provided the actual purpose of the cross-examination is not to show commission by the defendant of a specific crime of which he or she is not now accused, but to test only the credibility of the character witness. **Commonwealth v. Hurt**, 163 Pa. Super. 232, 235, 60 A.2d 828, 829 (1948).

Adams, 626 A.2d at 1233.

At trial, defense counsel questioned the two witnesses as to whether appellant intended to harm any children, and each testified on direct examination that appellant was incapable of formulating the intent to harm a child. This testimony related both to appellant's character and to his state of mind. The Commonwealth did not introduce evidence of appellant's prior misconduct merely to demonstrate appellant's propensity to commit similar acts. To the contrary, the evidence of prior instances of violence and domestic abuse rebutted the witnesses' testimony that appellant had a nonviolent nature, would not harm another individual and was unable to form the intent to hurt a child. The Commonwealth's line of cross-examination was permissible to impeach the witnesses with respect to their veracity and capacity to testify as to appellant's state of mind. **See Albrecht**, ___ Pa. at ___, 720 A.2d at 703 (finding prosecution's cross-examination on defendant's prior bad acts admissible to attack the character

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witness's credibility and to demonstrate that the witness's standard of what constitutes good reputation for sobriety was unsound); **Commonwealth v. Jones**, 341 Pa. 541, ___, 19 A.2d 393-94 (1941) (drawing distinction between cases where it is sought to prove particular acts of misconduct and those where purpose of examination is to test accuracy of testimony by showing that witness is not familiar with reputation or that standard of what constitutes good reputation is unsound); **Commonwealth v. Butts**, 204 A.2d 481, 486 (Pa. Super. 1964) (same); **Commonwealth v. Peterkin**, 511 Pa. 299, ___, 513 A.2d 373, 383 (1986) (noting that character witness may be cross-examined regarding his knowledge of particular acts of misconduct by defendant to test accuracy of testimony and standard by which he measures reputation), **cert. denied**, 479 U.S. 1070, 107 S.Ct. 962, 93 L.Ed.2d 1010 (1987).

Moreover, since appellant called these witnesses to support his defense that he never intended to harm the infant, the Commonwealth could properly cross-examine these witnesses regarding prior instances of violent conduct to demonstrate intent, malice or absence of accident. **See Commonwealth v. Odum**, 584 A.2d 953, 955 (Pa. Super. 1990) (citing **Commonwealth v. Potts**, 566 A.2d 287, 294 (Pa. Super. 1989)) (finding evidence of prior abusive acts relevant and admissible for the purpose of proving ill will, motive or malice); **Commonwealth v. Smith** 544 Pa. 219, ___, 675 A.2d 1221, 1229 (1996) (same), **cert. denied**, 519 U.S. 1153,

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137 L.Ed.2d 223, 117 U.S. 1090 (1997). After the defense witnesses testified that appellant was incapable of forming the intent to harm a child, the Commonwealth posed questions to support its theory of the case. With respect to the element of intent, the Commonwealth contended that appellant, either knowingly or recklessly, disregarded the risk that if he ceased taking his medication to control his temper he was capable of causing harm to individuals when enraged.

Each of the questions posed to the defense witnesses directly supported this theory. The fact that appellant had taken medication to curb his violent outbursts and had been institutionalized evidenced that appellant was aware of his temper control problem. Appellant decided, without consulting a medical expert, that such medication was no longer necessary to control his temper. After appellant ceased taking his medication, he physically abused his girlfriend and shattered several automobile windshields. These events demonstrated that appellant was aware of his inability to control his temper without medication; however, he disregarded the risk and did not resume his medical treatment. We conclude that the Commonwealth's questions with respect to appellant's prior violent episodes, institutionalization and medical history were relevant to demonstrate that appellant acted intentionally. Therefore, trial counsel's failure to object to the admission of such testimony did not infringe upon appellant's right to effective assistance of counsel.

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The fourth set of claims relate to the Commonwealth's introduction of appellant's prior bad acts when it cross-examined appellant. In this respect, appellant claims counsel was ineffective for failing to object when the prosecution cross-examined appellant as to:

- 1) whether he was an angry individual who took medication to control his temper;
- 2) whether he had been institutionalized for this problem;
- 3) whether he had struck his former or current girlfriend;
- 4) whether he had smashed windshields on prior occasions;
and
- 5) whether he had visited his son only three times in the past nine months.

When he took the stand, appellant testified on direct examination that he had problems with temper control but would never purposefully harm another individual. He admitted that he had broken several automobile windshields while enraged. Appellant explained that he had been hospitalized due to his temper-control problem and that he had taken medication to control his tendency toward violent outbursts. Appellant also testified that part of the frustration he felt towards the victim stemmed from the fact that he was prohibited from visiting with his son from a prior relationship.

We find that defense counsel had no basis upon which to object to the Commonwealth's cross-examination. Appellant testified on direct as to each of the subjects broached, and his testimony opened the door to the

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Commonwealth's cross-examination on these issues. **See Commonwealth v. Hawthorne**, 527 A.2d 559, 561 (Pa. Super. 1987) (finding that where accused testified that former husband struck her, door was open for prosecution to ask whether appellant stabbed husband during time he struck her), **appeal denied**, 517 Pa. 592, 535 A.2d 81 (1987); **see also Commonwealth v. Craft**, 455 Pa. 616, ___, 317 A.2d 213, 215 (1974). We find no impropriety in the Commonwealth's cross-examination of appellant regarding the many windshields he had shattered. The defense placed both his character and his ability to formulate the intent to commit the crimes charged at issue. Appellant elected to present evidence and to testify as to this element of the crimes charged. Therefore, the Commonwealth was entitled to rebut his defense by demonstrating appellant's awareness of his inability to control his temper without medical treatment and his choice to disregard this risk by foregoing treatment.

Furthermore, the Commonwealth could impeach appellant's credibility through his prior inconsistent statement, despite the fact that it referred to other bad acts. **See Meadows**, 553 A.2d at 1010; **Commonwealth v. Jones**, 341 Pa. at ___, 19 A.2d at 393. Appellant's statement to the police was admissible in its entirety, **see id.**, and in this statement, appellant indicated that he may have caused the infant's injuries, but that any physical harm he caused was accidental. He also admitted that he had struck his former girlfriend, been institutionalized for his temper problem and taken

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medication to control his anger. At trial, appellant completely repudiated his admission that he may have caused the victim's injuries and asserted that his statement had been procured by fear and a promise that if he admitted that he caused the victim's injuries, the authorities would not prosecute him. The prosecutor was entitled to confront appellant as to the inconsistencies between his trial testimony and his statement to the police. *See Meadows*, 553 A.2d at 1010 (observing that false and contradictory statements by the accused are admissible since the jury may infer they were made with intent to divert suspicion or mislead authorities, or to establish alibi or innocence, and hence indicate consciousness of guilt); *accord, Jones*, 341 Pa. at ___, 19 A.2d at 393. Thus, there is no just cause for complaint.⁵

Next, appellant claims that even if evidence of his prior bad acts had been properly admitted into evidence, he nonetheless is entitled to a new trial due to counsel's failure to request a cautionary instruction which explained the limited purpose for which such evidence had been admitted.

⁵ Appellant avers in his brief that appellate counsel was also ineffective for failing to object when the prosecutor introduced his statement to the police in its entirety. This claim is waived for failure to cite to relevant legal authorities: *See* Pa. R.A.P. 2119 (b).

Further, it lacks merit. "[I]f a voluntary confession is made to police officers, the whole is admissible in evidence, even though it may contain admissions of other offenses unrelated to the one for the commission of which the defendant is on trial." *Commonwealth v. Wood*, 16 A.2d 319, 320 (Pa. Super. 1940); *accord Commonwealth v. Hipple*, 333 Pa. 33, ___, 3 A.2d 353, 356 (1939). Hence, counsel was not ineffective for failing to object to the admission of appellant's confession in its entirety. *See Durst, supra*.

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See, e.g., Billa, 521 Pa. at ___, 555 A.2d at 841; *Commonwealth v. Claypool*, 508 Pa. 198, 1205-06, 495 A.2d 176, 179. In *Commonwealth v. Sam*, 535 Pa. 350, 635 A.2d 603 (1993), and in *Commonwealth v. Rollins*, 525 Pa. 335, 580 A.2d 744 (1990), our supreme court clarified *Billa*, and held that counsel's failure to request a cautionary instruction regarding prior bad acts does not constitute ineffectiveness per se. *See Commonwealth v. Buehl*, 540 Pa. 493, 506, 658 A.2d 771, 778 (1995). To obtain relief, a defendant must still demonstrate each of the three prongs of the test for ineffective assistance of counsel. *See id.* Appellant has failed to meet this burden.

Here, as in *Rollins*, the jury had heard evidence as to appellant's prior acts of misconduct *before* the Commonwealth cross-examined appellant and his witnesses as to those acts. Appellant admitted in his police statement that he took medication to control his temper, entered an institution due to this problem and struck his girlfriends, and that statement was admissible in its entirety. Furthermore, Mr. Hicks testified on direct examination that appellant had broken several windows, and the record was replete with evidence that appellant had a problem controlling his temper and was prone to outbursts. N.T., 12/12/97, at 287. Thus, the jury had heard evidence of these prior acts before the Commonwealth cross-examined appellant and his

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witnesses about them. We conclude no prejudice accrued from counsel's omission. **See Rollins**, 525 Pa. at ___, 635 A.2d at 749.⁶

Likewise, we must reject appellant's claim to the extent it is based upon counsel's failure to request a cautionary instruction regarding evidence that appellant failed to exercise his visitation privileges with his son as established via court order. Appellant's failure to visit his son was not an act which so resembled the crimes for which appellant was being tried as to suggest a propensity to assault or endanger the welfare of an infant. **Compare Sam**, 535 Pa. at ___, 580 A.2d at 608 (finding no prejudice resulted from failure to request limiting instruction regarding prior criminal activity; defendant's prior beatings of two-year-old son on day of murders did not so resemble murders as to suggest propensity to shoot to death three relatives); **and Young**, 1999 Pa. Lexis 139, *27 (finding no prejudice resulted from failure to request limiting instruction regarding prior criminal activity; fraudulent credit card scheme was not so similar to evidence pertaining to murder that jury's verdict could be considered unreliable); **with Billa**, 521 Pa. at ___, 535 A.2d at 842-843 (finding curative instruction necessary in murder case where appellant allegedly killed woman who spurned his romantic overtures; evidence defendant previously raped

⁶ Alternatively, we find that the evidence that appellant had previously shattered several windows was not so similar to the crimes charged as to render the jury's verdict unreliable. **See Sam**, 535 Pa. at ___, 580 A.2d at 608; **Commonwealth v. Young**, ___ Pa. ___, ___ A.2d ___, 1999 Pa. Lexis 139, *28-*29 (Pa. 2/4/98) **and** discussion thereof, *infra*.

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another woman and tried to strangle her after she spurned him was so similar to crime charged as to necessitate limiting instruction). In the case *sub judice*, as in **Sam** and **Young**, "we are certain that the jury would have returned the same verdict,' regardless of the presence or absence of a limiting instruction" as to evidence of appellant's failure to see his son. **Young**, 1999 Pa. Lexis 139, *27 (quoting **Sam**, 535 Pa. at ___, 580 A.2d at 608). Hence, appellant has failed to demonstrate the type of prejudice necessary to sustain his claim.

Appellant's sixth claim is that counsel was ineffective in failing to object to the prosecutor's closing remarks, which he asserts amounted to prosecutorial misconduct because they made reference to appellant's prior bad acts and included an expression of personal opinion as to appellant's guilt.

[A] prosecutor's arguments to the jury are not a basis for the granting of a new trial unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the accused which would prevent them from properly weighing the evidence and rendering a true verdict." **Commonwealth v. Gorby**, 527 Pa. 98, 112-114, 588 A.2d 902, 909 (1991). Moreover, the prosecution and the defense alike are afforded wide latitude and may employ oratorical flair in arguing to the jury. **Commonwealth v. Zettlemoyer**, 500 Pa. 16, 52-55, 454 A.2d 937, 956-957 (1982). The arguments advanced must, however, be based upon matters in evidence and/or upon any legitimate inferences that may be drawn from the evidence. **Commonwealth v. Chester**, 526 Pa. 578, 597-599, 587 A.2d 1367, 1377 (1991). Finally, any allegedly improper prosecutorial comments must also be examined within the context of the conduct of defense counsel. **Commonwealth v. Morales**, 549 Pa. 400, 423-425, 701 A.2d 516, 528 (1997). If a challenged remark is made in

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response to the defense's closing argument, it will generally be deemed fair response and hence permissible comment. **See, e.g., Commonwealth v. Williams**, 539 Pa. 61, 76 n.13, 650 A.2d 420, 428 n. 13 (1994), citing **Commonwealth v. Floyd**, 506 Pa. 85, 484 A.2d 365 (1984).

Commonwealth v. Abu-Jamal, 553 Pa. 485, ___, 720 A.2d 79, 110 (1998), *petition for cert. filed*, April 23, 1999.

While portions of the prosecutor's comments did, indeed, make reference to appellant's prior behavior, these comments were not outside the bounds of permissible oratorical flair. Appellant has taken the prosecutor's statements out of context in an effort to strengthen his argument. When viewed in the proper context, it is clear that the points expressed by the prosecutor were proper. The record reveals that the prosecutor's closing argument contained repeated references to appellant's prior bad acts, violent nature and failure to exercise visitation rights to see his child. However, we do not find these references rose to the level of prosecutorial misconduct.

For example, appellant claims that the prosecutor encouraged the jury to convict appellant because he was a man of poor character. The defense, however, had placed appellant's character at issue at trial and in its closing, and the prosecutor's comments were a fair response to its assertions that appellant was a "fine young man." We note that when the prosecutor commented on appellant's character, he prefaced his remarks by cautioning that the question before the jury was not whether appellant was a good or

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bad man, but whether appellant had committed the crimes charged. Then, the prosecutor acknowledged that the credibility of appellant was the key to the case and urged the jury to discredit his testimony because appellant lied about the circumstances surrounding his failure to visit his son. The prosecution suggested that appellant's failure to visit his own son when a court order expressly permitted him to do so undermined appellant's assertions that he deeply cared for children. The prosecution also argued that the instances of violent outbursts directly undermined the testimony of appellant and defense witnesses that appellant was a nonviolent man who would never abuse a child. Later, the prosecutor relied upon inconsistencies between appellant's statements to the police, his jail cellmate and the hospital staff to discredit appellant's recantation of his police statement.

In addition, the prosecutor used the testimony elicited from various witnesses regarding prior misconduct to refute appellant's claims of accident and establish intent. The prosecutor argued that the testimony of the victim's brother Allen, who witnessed appellant, in a fit of anger, yank the victim from her car seat, combined with circumstantial evidence demonstrated that appellant committed the crimes charged. Later, the prosecution returned to the issue of Allen's credibility, observed that the victim's brother was the one individual who witnessed appellant injure the victim and encouraged the jury to accept his testimony as credible. The prosecutor also argued that the victim's brother feared appellant. To

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support this assertion, the prosecutor recalled the reaction of the victim's brother when the defense asked him whether appellant was his friend. The prosecutor asserted that it was reasonable for the jury to infer from the brother's body language and eyes when he answered this question that he feared appellant. The prosecutor buttressed this argument with the testimony of the victim's mother and aunt, who stated that the victim's sister also was afraid of appellant.

Additionally, the prosecutor contended that appellant was aware that he needed medication to help control his anger and knew or had reason to know he posed a serious risk to others once he ceased taking his medication. This, the prosecution suggested, was evident from the fact that appellant had shattered windshields on nine occasions subsequent to the time he ceased taking his medication yet prior to inflicting the infant's injuries. Building upon this premise, the prosecution argued that appellant made a conscious decision not to take this medication, that his failure to take his medication amounted to at least recklessness and that the victim's injuries were a direct result of appellant's decision. The prosecutor concluded his argument by stating that appellant's mental instability did not excuse his behavior and requesting that the jury hold appellant responsible for his actions. He emphasized that appellant was aware of his uncontrollable violent outbursts and therefore had a duty to avoid caring for small children.

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Upon review, we find that, although he discussed appellant's prior bad acts during closing, the prosecutor did not refer to the prior misconduct to demonstrate that appellant was a bad man and therefore guilty of the crimes charged. Some of the prosecutor's references were fair responses to the closing argument of the defense. The remainder either undermined appellant's credibility, bolstered the credibility of the witnesses for the Commonwealth or negated the defense's assertions that appellant lacked mens rea. We are unconvinced that the prosecution exceeded the bounds of permissible conduct with his closing argument. *See Abu-Jabal*, 553 Pa. at ____ & n. 38, 720 A.2d at 110-111 & n. 38.⁷

⁷ In further support of his claim, appellant places emphasis on the prosecutor's remarks as to the bruises on the victim's sister and the fact that those bruises did not appear until after appellant began to reside in the household. These remarks provide little support for appellant's ineffectiveness claim because counsel did object to the remarks, and the trial court cured any prejudice from the remarks when it instructed the jury:

Ladies and gentleman of the jury, in the course of closing remarks there [were] references made to Jennifer Moore, who apparently is [the victim's] older sister. I want to point out to you that Jennifer is not alleged to be a victim here, and to the extent it has been suggested that she is in some manner involved or a victim of any criminal acts attributed to the defendant, to the extent that has been suggested you should totally and completely disregard it. This case has allegations of multiple incidents, which I'll get into, but it has essentially an allegation of one defendant and one victim.

N.T., 12/12/97, 392-93. We find this instruction sufficient to cure any prejudice that may have accrued to appellant in this respect. *See Commonwealth v. Washington*, 549 Pa. 12, ___, 700 A.2d 400, 409 (1997) (cautionary instruction by trial court cured any undo prejudice suffered by appellant), *cert. denied*, ___ U.S. ___, 118 S.Ct. 2375, 141

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Finally, we reject appellant's claim that the prosecutor impermissibly expressed his belief as to appellant's guilt and the credibility of evidence. Again, appellant has taken the prosecutor's remarks out of context and presented a distorted view of the prosecutor's closing argument. Nearly all of the prosecutor's references to his beliefs and thoughts were attempts to recall the testimony and evidence presented at trial—not expressions as to appellant's guilt or the credibility of evidence. We also note that the prosecutor repeatedly emphasized in his closing that it was for the jury to assess the credibility of witnesses and the other evidence presented. More importantly, the trial court instructed the jury to this effect. Thus, we again conclude that appellant has failed to demonstrate prejudice.

Conclusion

For these reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
: OF POTTER COUNTY, PA

VS. : NO. 93 OF 1997

MARK BAILEY, : CRIMINAL DIVISION
Defendant

TRANSCRIPT OF THE DEFENSE'S CLOSING ARGUMENT AT THE
JURY TRIAL, held before the Honorable John B. Leete,
President Judge, in the Courthouse, Coudersport, PA, on
December 16-17, 1997.

A P P E A R A N C E S:

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COPY

1 MR. FINK: May it please the Court, Mr.
2 Leber. Now that I got a new hearing aid I'm going to get
3 these hips fixed as well so next time I won't be limping
4 around and I'll be listening to everything you members of the
5 jury have. It has been a long two days for you. I don't
6 think that closing argument is as dumb as I thought the
7 opening arguments were. I think closing arguments are
8 important because it gives an opportunity to each counsel to
9 kind of point out to you as the jurors, and you folks are
10 going to have the real hard work here, the ultimate
11 determination, of whether or not the Commonwealth has proven
12 the defendant's guilt of the charges which he faces beyond a
13 reasonable doubt. That's the tough job in every case. In this
14 case unlike most others there is a principle of law about
15 which his Honor will charge you and I know that because we've
16 discussed it, the District Attorney and I've discussed it.
17 The Judge has given us an opportunity to do that, and it's
18 not up to me to tell you the law so if I misquote it in any
19 way what his Honor says the law is is what it is and that's
20 what you are to follow.

21 There is a principle called, and don't let the term
22 scare you, called corpus delecti which means the body of the
23 crime, and it has a special use in this type of case and it
24 is essential to us that you understand it and what we're
25 doing is taking 13 not 12, but 13 people off the street who

1 some of you have never been involved in any kind of judicial
2 proceeding and it's all kind of new to you. You've seen, as
3 the Court mentioned, you've seen television references and
4 court cases on television but when you get right down to it
5 and what is essential for you to understand is it's a tough
6 tough job. And so it is that in an attempt to try to explain
7 corpus delecti to you I went shopping this noon and I bought
8 two things. One of the things is I bought a roll of tape and
9 I asked my client to put a little piece of tape, I got
10 permission from the Judge before, a little piece of tape
11 along the floor here. I got something else in the toy
12 department of one of our local stores. Now just because this
13 is a toy please don't believe that I think that this is not a
14 very very serious matter. This is without doubt a very very
15 serious matter and I don't mean to minimize it by using a toy
16 to explain the principle of corpus delecti. The principle is
17 that where there is a purported confession where the, or
18 admission that is where the testimony of the Commonwealth
19 says the defendant confessed to the crime. He said to the
20 officer that he did certain things which amount to a
21 confession. Now I don't happen to agree that what he said is
22 a confession, but there's no question that it promotes or
23 brings out the corpus delecti ruling, and the rule is that
24 until you have determined beyond a reasonable doubt that
25 Commonwealth has proven that the particular crimes were

1 committed and that the victim was injured by those crimes you
2 cannot consider the confessions. Boy, is that a tough
3 concept.

4 My daughter and I were involved in a corpus delecti
5 case. My daughter has been out of law school for three or
6 four years from Temple I can't remember she reported that the
7 criminal law professor of Temple said it's not a practical
8 thing because the jury has already heard the confession. Are
9 they suppose to forget it? And the answer is, yes, if yeah,
10 you're suppose to forget it you can't use it if you find that
11 Commonwealth has not proven to you beyond a reasonable doubt
12 that the crimes charged against the defendant occurred. It's
13 not a question of whether he did it it's a question of
14 whether anybody committed the crimes. Have they proven to you
15 that the crimes were committed?

16 Let me demonstrate this if I can. This little white
17 line appears to be division line right here, division line
18 between all the testimony of the Commonwealth other than the
19 confession and over there is the confession testimony on the
20 right side my right side of the line. Now, the rule is that
21 until the Commonwealth proves beyond a reasonable doubt,
22 beyond a reasonable doubt that crimes, the five crimes of
23 aggravated assault, five crimes of simple assault and five
24 crimes of--forget what the other charge is. I don't even
25 have it. The Court will tell you what it is. I'll get it in

1 just a minute. I'll have to go over here and get it--until
2 they prove beyond a reasonable doubt that those crimes were
3 committed you can't go over here, and if you were to go over
4 here, assume for the moment that they have proven it then and
5 only then can you go up and so that you can see just play
6 with this little man here. In the Jack-in-the-Box are the
7 confessions. This represents all the confessions. You can't
8 even look at the confessions, you can't even look in this box
9 to see the confessions until the Commonwealth has proven
10 beyond a reasonable doubt to you that these crimes were
11 committed by somebody. That's the rule, tough concept. And
12 when I referenced the criminal law professor in Temple saying
13 that's a dumb rule he says, how can the jury forget the
14 confessions that they've heard. Well, I don't know how but
15 you are required before you consider, before you look in this
16 box and you have to turn it so that there is a little safety
17 mechanism, time elapses, something has to happen before you
18 see what's in the box. Are you going to be able to look in
19 that box to see the confessions? I say, no way, you can't. I
20 say, respectfully submit that you can't consider the
21 confessions, any testimony, and we're talking about the
22 testimony of two police officers, and I think there is one
23 other lay witness who may have testified, given some
24 testimony about a confession. I say you can consider none of
25 the testimony of the arresting officer because that all is

1 talk about the confession and you can't consider any of the
2 testimony of the polygraph operator same thing. Let's see
3 why.

4 The next concept, you've heard about it for a long
5 period of time, beyond a reasonable doubt. Let me use this
6 line again and that line is the reasonable doubt line. And
7 until the Commonwealth advances the proof such that it goes
8 up to and beyond that reasonable doubt they have not proven,
9 they have not carried their burden. So that if you have a
10 reasonable doubt, if you have a reasonable doubt as to
11 whether they have proven without the confession that crimes
12 have been, the crimes have been committed you only can't
13 consider that but you've got to find the defendant not
14 guilty. Again, a reasonable doubt is not that easy a concept.
15 In his opening remarks the District Attorney said, oh, my
16 it's not beyond any doubt it's beyond reasonable doubt.
17 We'll go ahead and prove there will be no doubt in your mind.
18 There is great doubt, great, great, great doubt. There's no
19 doubt in my mind that Commonwealth has not carried its
20 burden, has not carried its burden. Serious offenses serious
21 offenses.

22 Let me talk about the five counts of aggravated
23 assault. And I think that the elements are the same as simple
24 assault except as it relates to the seriousness of the
25 injury, the assault on a victim. The defendant cannot be

1 found guilty unless you find that the Commonwealth has proven
2 beyond a reasonable doubt that the defendant intentionally,
3 knowingly, or recklessly caused bodily injury to another. Now
4 those three terms are what we call words of art, words of
5 art. They have specific definite meaning as it relates to
6 the crimes of assault. The Judge will charge you about the
7 meaning.

8 First, let's do it without what's in that box. What's
9 in that box are the confessions right now. Your first duty
10 is to find if they have proven that this crime was committed
11 by anybody. What do they have without the confessions to
12 prove the crime that the child was intentionally, knowingly,
13 or recklessly injured by that type of conduct of another?
14 Anybody? Did you hear the quote, "child abuse", testimony of
15 the three medical witnesses, and this is not a child abuse
16 case, it is not. The defendant is not charged with child
17 abuse. The defendant is charged with five counts of
18 aggravated assault, five counts of simple assault and five
19 counts of the third offense I'll talk about when I go over
20 and look at it.

21 What do you have without looking at that box? You have
22 the testimony of the doctors, right, all of whom essentially
23 testified that within a reasonable degree of medical
24 certainty this child suffered three or four breaks in the
25 lower extremities and two fractures of the ribs due to child

1 abuse. Crucial they didn't say by the intentional act of
2 another; did they? No. They said by a child abuse. What,
3 doctor, what do you mean child abuse? How do you define
4 child abuse? Well, any action where any action or inaction
5 of the custodian or anybody else which results in injury to a
6 child. Question. Well, would that include a sibling injuring
7 his brother, his or her brother or sister? Well, yeah if it
8 involved lack of supervision. Now, bear in mind the
9 Commonwealth must prove beyond a reasonable doubt. Does that
10 prove to you beyond a reasonable doubt? You can't see what's
11 in there. Don't forget you're talking only about beyond a
12 reasonable doubt that the crimes of Aggravated Assault,
13 Simple Assault, five counts each occurred. How did they
14 occur? What was used to prove to you beyond a reasonable
15 doubt as to the occurrence of aggravated or simple assault?

16 Boy, I wish I could talk to you. I can't. I wish I
17 could get some feed back. I can't, it's not proper. I would
18 suspect that if I could enter into discourse with you now
19 you'd say, H.B., I don't think--I can't think of anything
20 that they have if I can't look into that box. I can't think
21 of anything that where they've even come close to proving
22 beyond a reasonable doubt that those crimes occurred. And it
23 is not a crime of aggravated assault if a sibling falls on
24 another.

25 At this juncture I guess I want to talk to you about

1 those magic words of intentionally, knowingly or recklessly
2 and his Honor will do that. Knowingly, knowingly means the
3 actor is practically certain by what he does, practically
4 certain that what he does will result in injury to the
5 victim. Please keep a watchful ear, if you will, when the
6 Judge talks about the meaning of intentionally, knowingly or
7 recklessly. Recklessly means with respect to bodily injury a
8 conscious disregard concerning a substantial and
9 unjustifiable risk that bodily injury will result.

10 Do you know this case and other things lately now that
11 I've reached 71 years of age throw me back to many years ago.
12 This case--I remember Debbie, she's our oldest of six when
13 she was just an infant child I'd pick her up, spread her
14 legs, put them around my shoulder and go like this, hey look
15 folks, Debbie Fink, the famous circus performer and then I
16 would kind of bend and bring her around like this and put her
17 down. Is there a difference between that and what it is said
18 my client did by confession when he held a child up with one
19 hand? Does that make it criminal because he does one
20 hand. ? I held her on my back with one hand. I couldn't
21 help but think, Lord, for the grace of God there go I. We're
22 playing with our kids. Is that aggravated assault? Is that
23 the knowing element with respect to bodily injury when the
24 actor is aware that a that this type of activity is
25 practically certain to cause injury? No, we're not even

1 thinking of injury we're thinking about giving our kids,
2 playing with our kids, having fun. Oh, but this man gets
3 upset. Do you want to know how upset I got when the kids
4 were fighting in the back seat over who was to sit in front
5 and one of them threw up all over the back seat because she
6 said she got sick, car sick and the other one did too and
7 they're fighting. Well, the district attorney thinks that
8 makes it some kind of by him getting upset like that that
9 puts the actor in such a frame that frame of mind that he
10 will commit aggravated assault or simple assault. No,
11 members of the jury, we just get upset.

12 Well, wait a minute, H.B., how about the defendant who
13 smashed nine windshields or something like that I mean that's
14 got to be very unusual. Did you? That's why I put him on the
15 stand. Did you? Yes, sir, I not only smashed one I smashed
16 nine. I was surprised to hear him say nine windshields, but
17 you know what did he say with equal candor. Did you ever hit
18 a child? No.

19 What have they proven to you beyond a reasonable
20 doubt? Nothing except my man, my client fine young man is
21 the victim of sugar Diabetes which has to be regulated and
22 the symptoms are when his sugar is up he gets nervous, edgy,
23 and emotional and when he gets down he gets passive to the
24 point where he almost passes out and has on occasion.

25 Assume for a moment that somehow you would get to the

1 point where you could step over this line and open this box.
2 You're going to have to take a big step to do that, but you
3 finally are able to look at the confessions. Now, you're
4 considering those confessions. Do those confessions prove to
5 you beyond a reasonable doubt that my client committed
6 aggravated assault? Very very serious crimes no question
7 about it. No question. I don't think so.

8 You know why our law of Pennsylvania has adopted the
9 Corpus Delecti Rule and that's clear because the framers of
10 our legal network here in Pennsylvania have acknowledged that
11 confessions are gained in many ways and cannot be totally
12 relied on, that's why the Corpus Delecti Rule. Incidentally,
13 you heard that Commonwealth had an opportunity to rebut
14 what we put on. Interesting Sergeant Shirley, who I assume
15 is up there right now, I don't know that he is. No
16 explanation has been made as to why he wasn't here, didn't
17 come in to negate the defendant's testimony that he and the
18 arresting officer said you'll probably only get a fine, isn't
19 that interesting. See officers have various, and I'm sorry
20 but I got to say this, devious, because I believe it devious
21 methods of investigation. Oh, you probably only get a fine
22 tell what happened. And you heard me ask him, well, did
23 these things happen? No, some of them did some of them
24 didn't. But what did he tell you? Does that tell you that
25 he has confessed to aggravated assault and simple assault?

1 If I were to take a vote of the 26 people in this room,
2 however many are here as to how many of us are against child
3 abuse, I hope that everyone raises your hand, everyone out
4 there raise your hand and I would raise mine. I mean child
5 abuse is a terrible thing and don't you see how they wove
6 these charges around the term child abuse, and I wonder it's
7 interesting you heard the testimony concerning the
8 complaintant of the baby Rebecca. Mother finally saw a leg
9 that was swollen and then went down little bit by the time
10 she was taken up there and sensitive, but interesting she was
11 asleep on and off when she went to the hospital with this
12 horrendous injury. Now I'm not saying, I'm not minimizing
13 breaks of bones, but what I'm saying to you is I wonder how
14 many bones I broke of Debbie, Dawny, Brian and Bruce and
15 Robin and Christopher maybe some, I don't know, but if they
16 don't react any worse than that maybe I did, and I remember
17 bruises and black and blue marks, and I guess I could
18 remember pulling them out of cars when I was upset because
19 they threw up, because they were fighting or whatever. See
20 the Commonwealth has woven, woven a web of circumstantial
21 evidence pointing to that very good young man over there and
22 I don't appreciate it. I'm not pointing my finger to anyone
23 person at all I'm just saying that is a terrible thing.

24 Let me make a couple comments about a couple of the
25 other witnesses, the doctors' testimony. First doctor,

1 lovely lady, talks about the first injury ankle injury, it
2 could either come from a pull or a twist. I think a pull is
3 just almost the opposite from a twist. Now that's the kind
4 of testimony that Commonwealth relies on to persuade to you
5 that they've proven to you beyond a reasonable doubt that
6 there's been assault. There's been a crime committed by
7 somebody. Beyond a reasonable doubt well, could it have
8 occurred by a sibling falling directly? Well, Dr. Supinski
9 said no, but then when he further tried to go into the type
10 of force I thought he said traction or a direct blow. I
11 thought that's what he said traction or a direct blow. A
12 direct blow like a karate chop or hammer? No, a direct blow.
13 I don't know what a direct blow is if it ain't a karate chop
14 or hammer I don't know. What else? Please ask yourself when
15 you go into the jury room for deliberations what did the
16 Commonwealth prove to you to persuade you beyond a reasonable
17 doubt that the crimes charged had been committed?

18 What I'm looking for now is the complaint because I
19 want to go into this, excuse me, for going over here because
20 as a matter of fact I can't be over there I like to lean on
21 that, but the Commonwealth did not prove beyond a reasonable
22 doubt that these crimes were committed so I can't go over
23 there.

24 Aggravated Assault Endangering the Welfare of Children.
25 The defendant--this is the charge the defendant, that's my

1 client, did, "On or about from 2/3/96 to 9/23/96 being a
2 parent, guardian or other person supervising the welfare of
3 the child." Well, stop right there. Stop. Time. My client
4 was a parent but not of the child injured so that's out.
5 Guardian, he was no guardian. Who made him guardian of
6 Rebecca? Nobody. He's not a guardian or other person
7 supervising the welfare of a child under the age of 18. All
8 the testimony shows who was the supervisor, Momma, back
9 there, God bless her. She was the supervisor admittedly in
10 charge of supervising the welfare and well being of Rebecca.
11 So I think you can stop right there but let me go
12 on. "Knowingly endanger the welfare of a child by violating a
13 duty of care." Did he have a duty of care? Did mother's
14 paramour have a duty of care of Rebecca, protection or
15 support to wit on three occasions while living at the
16 residence of Tammy Baker? One might say, well, maybe Tammy
17 Baker had a duty of care it was her house I don't know. But
18 certainly not my client. "The accused endangered the welfare
19 by causing her to suffer three broken bones and in Roulette
20 Township accused again endangered the welfare by causing her
21 to suffer another broken bone." Oh, I guess that was--this
22 was the criminal complaint. It was amended to include--the
23 last included two broken bones, namely two ribs.

24 Endangering the welfare of children is a very very
25 serious offense. It was not met. Ladies and gentlemen of the

1 jury, it was not meant to cover situations like this. But
2 what was proven to you you can't look at that box beyond a
3 reasonable doubt to prove that those crimes were committed?
4 Well, let's talk about that a minute in reference to
5 endangering the welfare of children maybe somebody did, maybe
6 that crime was committed. Now is it committed just because
7 the child suffered broken bones? You heard the doctor
8 testify that there are some injuries children are born with,
9 some conditions that bones just break easily, easily. I
10 thought he testified, and I'd like to have heard that
11 testimony read back I'd love to ask but I can't, I thought
12 the doctor testified that it doesn't take much trauma in
13 children of tender years to break a bone. I don't know the
14 answer to the question. Merely because the child has broken
15 bones does that mean that endangering the welfare of children
16 the crime has occurred? I don't think so, but if you find
17 over here that they have proven beyond a reasonable doubt as
18 to that crime then let's go over and look at this confession
19 as it relates to that charge.

20 Members of the jury, he is not a parent, he is not a
21 guardian and he was not a person supervising the welfare of
22 the child. Nobody ever said he was baby sitting that I
23 remember. There were baby sisters, weren't there? Not my
24 client.

25 Members of the jury, I'm not going to work myself up

1 any more over this. I guess I have. What I'm sure you
2 gathered was true a typed statement of the recorded supposed
3 confession elicited through the questioning of the arresting
4 officer and I was going over that, but I'm not going over
5 that. It's simply my contention, and I don't know maybe I'm
6 going to ask the Judge to allow you to take this out with
7 you. It's probably too late now I'm just thinking about it
8 as I'm standing here talking at you. He probably won't grant
9 it. What was said there? What was said that constitutes the
10 crime of--that constitutes confession? Well, maybe this
11 caused it. I remember of taking the child out, yeah, I was
12 upset, I was upset at the child, mother or whatever, but I
13 took her out of the car seat. And I do remember that her leg
14 got stuck the wrong way when I was taking her out or
15 something. Wait a minute. Did you confess that you reached
16 over to take the baby out of a crib and that her leg got
17 stuck in one of the rungs, and it made the crib quiver?

18 I remember of seeing the kids into the car, I was
19 supervising them no question about it. I was there and one
20 of them slammed the door on the other's finger almost cut the
21 fingers off I remember that because I was right there. Was I
22 supervising? Yes, I was a parent. Am I guilty of the very
23 serious crime of endangering welfare of children? Please
24 answer that. You can't say anything and I'll bet you dollars
25 to donuts that every one of you who is a parent can think of

1 specific situations where you as parent were there and the
2 child got injured.

3 See, I'm going to be three more minutes I promise. A
4 weaving of a web, weaving of a web of circumstantial evidence
5 which ensnares the defendant such that the jury can have no
6 alternative other than to find that he is guilty because of
7 the number of breaks and the period of time and that he had a
8 terrible temper and that he did not allow that temper to
9 spill over onto young children. He just didn't. I give
10 Brother Mike a lot of credit for a lot of insight. I don't
11 know if you do or not. I give him credit for being totally
12 honest. He told us essentially this young man did not at any
13 time intentionally or recklessly or knowingly harm this child
14 or any children.

15 Members of the jury, I'm going to take my Jack-in-the-
16 Box and return to my table unless the District Attorney wants
17 to have it he can have it too, but I ask you on behalf of my
18 client to find that Commonwealth failed in its burden.
19 Please listen closely to his Honor's definition of what a
20 reasonable doubt is. I've been in this profession for 42
21 years and I have a hard time with this seemingly easy
22 concept. It's not an easy concept to me. It's not an easy
23 concept reasonable doubt. All that I can tell you is that if
24 the Commonwealth--if you have a reasonable doubt, a
25 reasonable doubt after the presentation by the Commonwealth

1 of the defendant's guilt, than you must find him not guilty.

2 Members of the jury, thank you for your attention.

3 (End).

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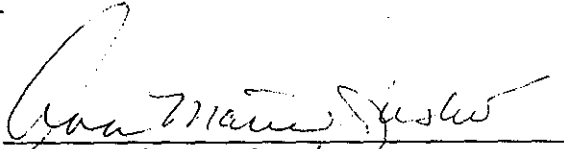
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C E R T I F I C A T E


I, Ann Marie Jusko, do hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the hearing of the above cause, and that this copy is a correct transcript of the same.

You are hereby notified that the evidence in the above-entitled case has been this day lodged by me with the Prothonotary/Clerk of Courts of Potter County, Coudersport, Pennsylvania, and that the same will be duly certified and filed so as to become part of the Record if no objection be made thereto within five (5) days from this date.

Dated: 12-7-98


Ann Marie Jusko, Court Reporter

The foregoing Record of the proceedings upon the hearing of the above cause is hereby approved and directed to be filed.


JOHN B. LEETE, PRESIDENT JUDGE
55TH JUDICIAL DISTRICT